(13)

No. 04-6432
Title: Aurelio O. Gonzalez, Petitioner
v.
James V. Crosby, Jr., Secretary, Florida Department of Corrections
Docketed: September 22, 2004
Lower Ct: United States Court of Appeals for the Eleventh Circuit
Case Nos.: (02-12054)
Decision Date: April 26, 2004
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Jul 22 2004	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due October 22, 2004)
Oct 18 2004	Waiver of right of respondent James V. Crosby, Jr., Secretary, Florida Department of Corrections to respond filed.
Nov 4 2004	DISTRIBUTED for Conference of November 24, 2004.
Nov 16 2004	Response Requested . (Due December 16, 2004)
Dec 15 2004	Brief of respondent James V. Crosby, Jr., Secretary, Florida Department of Corrections in opposition filed.
Dec 29 2004	Reply of petitioner Aurelio O. Gonzalez filed. (Distributed)
Dec 30 2004	DISTRIBUTED for Conference of January 14, 2005.
Jan 14 2005	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED limited to Question one presented by the petition.
Feb 22 2005	SET FOR ARGUMENT ON Monday, April 25, 2005.
Feb 24 2005	Joint appendix filed.
Feb 25 2005	Brief amicus curiae of Office of the Federal Public Defender for the Middle District of Tennessee filed.
Feb 25 2005	Brief of petitioner Aurelio O. Gonzalez filed.
Feb 25 2005	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Feb 28 2005	Brief amicus curiae of Abu-Ali Abdur' Rahman filed.
Mar 7 2005	Record received from U.S.C.A. for the 11th Circuit. (1 envelope)
Mar 25 2005	CIRCULATED.
Mar 31 2005	Brief of respondent James V. Crosby, Jr., Secretary, Florida Department of Corrections filed. (Distributed)
Apr 1 2005	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Apr 1 2005	Brief amicus curiae of United States filed. (Distributed)
Apr 1 2005	Brief amicus curiae of Criminal Justice Legal Foundation filed. (Distributed)
Apr 1 2005	Brief amici curiae of Tennessee, et al. filed. (Distributed)
Apr 5 2005	Record received from U.S.D.C. Southern Dist. of Florida. (1 volume)
Apr 15 2005	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Apr 18 2005	Reply of petitioner filed. (Distributed)
Apr 25 2005	Argued. For petitioner: Paul M. Rashkind, Assistant Federal Public Defender, Miami, Fl.

(6)

No. 04-6132

SUPREME COURT, U.S.
FILED
JUL 22 2004
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

AURELIO O. GONZALEZ,
Petitioner,

v.

SECRETARY FOR THE DEPARTMENT OF CORRECTIONS,
James Crosby, Secretary,
Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, Aurelio O. Gonzalez, pursuant to Sup. Ct. R. 39.1, respectfully moves for leave to file the accompanying petition for writ of certiorari in the Supreme Court of the United States without payment of costs and to proceed *in forma pauperis*.

Petitioner was previously found financially unable to obtain counsel and the Federal Public Defender of the Southern District of Florida was appointed to represent Petitioner pursuant to 18 U.S.C. § 3006A. Therefore, in reliance upon Rule 39.1 and § 3006A(d)(6), Petitioner has not attached the affidavit which would otherwise be required by 28 U.S.C. § 1746.

Miami, Florida
July 22 2004

By:

KATHLEEN M. WILLIAMS
Federal Public Defender

Paul M. Rashkind, Supervisory
Assistant Federal Public Defender
150 West Flagler Street, Suite 1500
Miami, Florida 33130-1555
(305) 536-6900

RECEIVED
SEP 15 2004
OFFICE OF THE CLERK
SUPREME COURT, U.S.

RECEIVED
JUL 23 2004
THE CLERK
SUPREME COURT U.S.

BEST AVAILABLE COPY

JUL 2 2 2004
OFFICE OF THE CLERK

NO: 04-6432

IN THE
SUPREME COURT OF THE UNITED STATES

AURELIO O. GONZALEZ,

Petitioner,

v.

SECRETARY FOR THE DEPARTMENT OF CORRECTIONS,
James Crosby, Secretary,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

KATHLEEN M. WILLIAMS
Federal Public Defender
PAUL M. RASHKIND, Supervisory
Assistant Federal Public Defender
Chief of Appeals
Counsel for Petitioner
150 West Flagler Street, Suite 1500
Miami, Florida 33130-1555
Telephone (305) 536-6900

QUESTION PRESENTED FOR REVIEW

The courts of appeals are divided about the jurisdiction of district courts to entertain Fed. R. Civ. P. 60(b) motions in habeas corpus cases. Seven circuits address the continuing viability of Rule 60(b) on a flexible case-by-case basis, while three circuits, including the Eleventh Circuit below, hold that AEDPA erects a bright line jurisdictional bar to Rule 60(b) motions in habeas corpus proceedings. The conflict among the circuits has exacerbated since the Court dismissed as improvidently granted Abdur'Rahman v. Bell, 537 U.S. 88 (2002). The instant petition replicates for the Court's consideration the questions left unanswered in Abdur'Rahman, without the procedural and jurisdictional difficulties that caused it to be dismissed:

I. Whether the court of appeals erred in holding that every Rule 60(b) motion (other than for fraud under (b)(3)) constitutes a prohibited "second or successive" petition as a matter of law, in square conflict with decisions of this Court and of other circuits.

II. Whether a court of appeals abuses its discretion in refusing to permit consideration of a vital intervening legal development when the failure to do so precludes a habeas petitioner from ever receiving any adjudication on his claims on the merits.

INTERESTED PARTIES

There are no parties to this proceeding other than those named in the caption of the case. The en banc court of appeals, however, consolidated two otherwise unrelated cases with Mr. Gonzalez's appeal, involving Stephen A. Mobley vs. Derrick Schofield, and Emil Lazo vs. United States of America. The present petition is filed only on behalf of Aurelio O. Gonzalez.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

INTERESTED PARTIES ii

TABLE OF AUTHORITIES vi

PETITION 1

OPINION BELOW 2

STATEMENT OF JURISDICTION 2

STATUTORY AND OTHER PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE WRIT 9

I. Whether the Court of Appeals Erred in Holding That Every Rule 60(b) Motion (Other than for Fraud under (b)(3)) Constitutes a Prohibited "Second or Successive" Petition as a Matter of Law, in Square Conflict with Decisions of this Court and of Other Circuits 9

A. The Court Should Grant Certiorari to Resolve the Significant and Continuing Split Among the Circuits, Left Unanswered by Abdur'Rahman v. Bell, 537 U.S. 88 (2002), Over the Jurisdiction of District Courts to Entertain Fed. R. Civ. P. 60(b) Motions in Habeas Corpus Cases 9

B. The Gonzalez Decision's Bright Line Prohibition of Rule 60(b)(6) Jurisdiction In Habeas Corpus Cases Is Wrong, As Are the Decisions of the Sixth and Tenth Circuits, in Rejecting the Case-by-Case Jurisdiction Granted by Seven Other Circuit Courts of Appeals 16

(1) Applying 28 U.S.C. § 2244(b)(1)'s Successive Application Bar as a Bright Line Prohibition of Rule 60(b)(6) Jurisdiction Is Contrary to the Court's Precedents, Which Carefully Avoid Conflict with the Fifth Amendment's Due Process Clause and the Suspension of the Writ Clause of U.S. Const. art. I sec. 9 17

(2) The Eleventh Circuit's Bright Line Prohibition of Rule 60(b) Jurisdiction Erroneously Replaces the Rule 60(b) Standard for Relief With a Formulation Developed in the Inapposite Decision of Calderon v. Thompson 23

II. Whether a Court of Appeals Abuses its Discretion in Refusing to Permit Consideration of a Vital Intervening Legal Development When the Failure to Do So Precludes a Habeas Petitioner from Ever Receiving Any Adjudication on His Claims on the Merits 27

(A) The Due Process Clause of the Fifth Amendment Prohibits Any Interpretation of Rule 60(b)(6) That Deprives a Habeas Petitioner of His Entitlement to a Timely Filed First Federal Habeas Corpus Proceeding 28

(B) The Eleventh Circuit's Bright Line Rule Interpreting AEDPA as Repealing, Sub Silentio, Rule 60(b)(6) in Habeas Corpus Cases Violates The Suspension of the Writ Clause of U.S. Const. art. I sec. 9 32

CONCLUSION 34

APPENDIX

Decision of the Court of Appeals for the Eleventh Circuit,
Gonzalez v. Sec'y for Dept. of Corrections,
366 F.3d 1253 (11th Cir. 2004) (en banc) A-1

Rule 60(b) Motion to Amend or Alter Judgment, dated July 30, 2001 . . . . . A-2

Order Denying Motion to Amend and Closing Case, dated March 5, 2002 . . . . . A-3

Petition for Writ of Habeas Corpus, dated June 23, 1994 . . . . . A-4

Order Granting Motion to Amend Complaint, dated October 9, 1997 . . . . . A-5

Amended Motion for Petition of Habeas Corpus, dated November 4, 1997 . . . . . A-6

Report Re Dismissal § 2254 Petition as Time Barred, dated July 16, 1998 . . . . . A-7

Supplement to July 16, 1998 Report of Magistrate Judge, dated August 14, 1998 . A-8

Supplemental Report of Magistrate Judge, dated August 14, 1998 . . . . . A-9

Order of Dismissal of § 2254 Petition as Time Barred, dated September 9, 1998 A-10

Order Granting Motion to Proceed in Forma Pauperis on Appeal,
dated February 11, 2000 . . . . . A-11

TABLE OF AUTHORITIES

CASES:

Abdur'Rahman v. Bell,

535 U.S. 1016 (2002) 10, 14

537 U.S. 88 (2002) 9, 10, 22, 27

Abney v. United States,

431 U.S. 651 (1977) 30

Anti-Fascist Committee v. McGrath,

341 U.S. 123 (1951) 29

Artuz v. Bennett,

531 U.S. 4 (2000) 6, 8, 15, 20, 28

Bell v. Burson,

402 U.S. 535 (1971) 30

Blackmon v. Money,

531 U.S. 988 (2000) 20

Bloom v. Illinois,

391 U.S. 194 (1968) 29

Boyd v. United States,

304 F.3d 813 (8th Cir. 2002) 12

Calderon v. Thompson,
523 U.S. 538 (1998) ..... passim
Cornell v. Nix,
119 F.3d 1329 (8th Cir. 1997) 20
Delancy v. Florida Dept. of Corrections,
246 F.3d 1328 (11th Cir. 2001) 6, 8, 27
Dunlap v. Frank,
123 S. Ct. 2644 (2003) 12
Dunlap v. Litscher,
301 F.3d 873 (7th Cir. 2002) 12
Evitts v. Lucey,
469 U.S. 387 (1984) 28-30
Ex parte Yerger,
8 Wall. 85, 19 L.Ed. 332 (1869) 19
Felker v. Turpin,
518 U.S. 651 (1996) 18, 19, 33, 34
Finch v. Vaughn,
67 F.3d 909 (11th Cir. 1995) 15
Fuentes v. Shevin,
407 U.S. 67 (1972) 29
Goldberg v. Kelly,
397 U.S. 254 (1970) 29, 30

Gonzalez v. Sec'y Dept. of Corrections,
366 F.3d 1253 (11th Cir. 2004) ..... passim
Graham v. Richardson,
403 U.S. 365 (1971) 30
Guyton v. United States,
23 Fed. Appx. 539 (7th Cir. 2001) 20
Hamilton v. Newland,
___ F.3d ___, 2004 WL 1470516 (9th Cir. July 2, 2004) 14
Harris v. United States,
367 F.3d 74 (2d Cir. 2004) 13
Hess v. Cockrell,
281 F.3d 212 (5th Cir.2002) 13
Houston v. Lack,
487 U.S. 266 (1988) 2
Joint Anti-Fascist Refugee Committee v. McGrath,
341 U.S. 123 (1951) 30
Klapprott v. United States,
335 U.S. 601 (1949) 24
Lonchar v. Thomas,
517 U.S. 314 (1996) 21, 22, 26, 31
Lopez v. Douglas,
141 F.3d 974 (10th Cir. 1998) 13

Mabry v. Johnson,
467 U.S. 504 (1984) 15
Martinez-Villareal v. Stewart,
523 U.S. 637 (1998) 18, 19, 21, 34
McQueen v. Scroggy,
99 F.3d 1302 (6th Cir. 1996) 13
Mobley v. Head,
306 F.3d 1096 (11th Cir. 2002) (vacated panel decision) 22
Morrissey v. Brewer,
408 U.S. 471 (1972) 29, 30
Muniz v. United States,
236 F.3d 122 (2d Cir. 2001) 20, 21
Reg'l Rail Reorganization Act Cases,
419 U.S. 102 (1974) 16
Reid v. Angelone,
369 F.3d 363 (4th Cir. 2004) 14
Reinoso v. Artuz,
1999 U.S. Dist. LEXIS (S.D.N.Y. May 25, 1999) 21
Rodriguez v. Mitchell,
252 F.3d 191 (2d Cir. 2001) 12

Rodwell v. Pepe,
324 F.3d 66 (1st Cir.),
cert. denied 124 S. Ct. 224 (2003) 12, 22
Ross v. Artuz,
150 F.3d 97 (2d Cir. 1998) 21
Sanders v. United States,
373 U.S. 1 (1963) 33
Schlup v. Delo,
513 U.S. 298 (1995) 33
Sherbert v. Verner,
374 U.S. 398 (1963) 30
Slack v. McDaniel,
529 U.S. 473 (2000) . . . . . passim
Tal v. Miller,
1999 U.S. Dist. LEXIS (S.D.N.Y. Jan 27, 1999) 21
Thomas v. Roe,
23 Fed. Appx. 847 (9th Cir. 2001) 20
Thompson v. Calderon,
151 F.3d 918 (9th Cir 1998) 12
Townsend v. Burke,
334 U.S. 736 (1948) 15

United States v. Edwards,
309 F.3d 110 (3d Cir.2002) 13
United States v. Tucker,
404 U.S. 443 (1972) 15
United States v. Weinstock,
340 F.3d 200 (4th Cir.),
cert. denied, 124 S. Ct. 496 (2003) 12

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES:

U.S. Const. Amend V 3, 17, 28, 29
U.S. Const. Amned XIV 29
U.S. Const. Art. I, sec. 9 . . . . . 2, 17, 19, 30, 32
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1291 . . . . . 2, 30
28 U.S.C. § 1631 10
28 U.S.C. § 2244 3
28 U.S.C. § 2244(b) 28
28 U.S.C. § 2244(b)(1) 17, 32-34
28 U.S.C. § 2244(b)(2) 32, 33
28 U.S.C. § 2244(b)(3)(E) 19
28 U.S.C. § 2253 . . . . . 2, 5
28 U.S.C. § 2253(c) 18

28 U.S.C. § 2254 . . . . . passim
28 U.S.C. § 2255 . . . . . passim
Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"),
Pub. L. No. 104-132, 110 Stat. 1214 . . . . . passim
Sup. Ct. R. 13.1 2
Sup. Ct. R. Part III 2
Fed. R. App. P. 4(c) 2
Fed. R. Civ. P. 60 . . . . . 16, 17, 22
Fed. R. Civ. P. 60(b) . . . . . passim
Fed. R. Civ. P. 60(b)(3) . . . . . passim
Fed. R. Civ. P. 60(b)(6) . . . . . passim

OTHER AUTHORITIES:

Hertz & Liebman, Federal Habeas Corpus Practice and Procedure
§ 28.4 (4th ed. 2001) 32, 33
Wright, et al., Federal Practice and Procedure: Civil 2d §§ 2851-2873 (1995) 24

IN THE
SUPREME COURT OF THE UNITED STATES

No:

AURELIO O. GONZALEZ,

Petitioner,

v.

SECRETARY FOR THE DEPARTMENT OF CORRECTIONS,
James Crosby, Secretary,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Aurelio Gonzalez respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 02-12054 in that court on April 26, 2004, Gonzalez v. Secretary for Department of Corrections, James Crosby, Secretary, 366 F.3d 1253 (11th Cir. 2004) (en banc), which affirmed the final order and judgment of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the final order of the United States District Court for the Southern District of Florida, is contained in the Appendix (A-1).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the en banc court of appeals was entered on April 26, 2004. This petition is timely filed pursuant to Sup. Ct. R. 13.1. The district court had jurisdiction of this case pursuant to Fed. R. Civ. P. 60(b), governing motions for relief from judgments and orders. The court of appeals had jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 and, arguably, § 2253. The appeal was timely filed on April 2, 2002, R1:36 (under the prison mailbox rule),[1] from the Order Denying Motion to Amend and Closing Case, entered March 6, 2002, which denied Mr. Gonzalez's Rule 60(b) Motion to Amend or Alter Judgment. R1:34. Sitting en banc, the court of appeals granted a certificate of appealability in Gonzalez's appeal on the question, "What standards are applicable to Rule 60(b) in § 2254 cases, and in light of those standards was it an abuse of discretion for the district court to deny the motion?" 366 F.3d at 1268.

STATUTORY AND OTHER PROVISIONS INVOLVED

The following constitutional provisions, court rule, and statutes are involved in the issues presented by the petition:

U.S. Const. art. I sec. 9 (Suspension Clause):

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of rebellion or Invasion the public Safety may require it.

---

[1] See Fed. R.App. P. 4(c); Houston v. Lack, 487 U.S. 266 (1988).

U.S. Const. amend. V (Due Process Clause):

No person shall ... be deprived of life, liberty or property, without due process of law ...

Fed. R. Civ. P. 60(b):

Rule 60. Relief From Judgment or Order

• • •

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., §§ 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

28 U.S.C. § 2244 Finality of determination:

a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(b) (1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3) (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of

the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

28 U.S.C. § 2253 Appeal:

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.
(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

STATEMENT OF THE CASE

Petitioner was the pro se movant in the district court and the appellant in the court of appeals. The respondent, Secretary for the Department of Corrections, has custody of petitioner and will be referred to as the state. The record will be noted by reference to the volume number, document number, and page number of the Record on Appeal of the court of appeals.

Mr. Gonzalez is incarcerated.

Course of Proceedings and Disposition in the District Court

Aurelio Gonzalez is a Florida state prisoner serving a 99-year prison sentence for robbery with a firearm. On June 17, 1997, he filed a pro se federal petition for writ of habeas corpus, R1:1,

and an amended petition on November 12, 1997. R1:9. The amended petition was filed following a motion for leave to amend, R1:8, which was granted on October 9, 1997. R1:9. As amended, the petition sets forth two claims: (1) Mr. Gonzalez's state guilty plea was involuntary because it was induced by untrue information about the relatively short time he would likely serve (13 years) on a 99-year sentence; (2) Mr. Gonzalez was sentenced based upon an inaccurate criminal history, which included convictions of other persons mistakenly thought to be him. Id. Without addressing the merits, the district court dismissed the petition on September 9, 1998, as untimely filed under the Antiterrorism and Effective Death Penalty Act of 1996. R1:17.

Mr. Gonzalez filed a timely pro se notice of appeal. R1:20. The district court initially granted a Certificate of Appealability, R1:23, without setting forth an issue, but the deficient COA was remanded to the district court. R1:25. The district court then denied a COA, on December 14, 1999. R1:27. Mr. Gonzalez filed a timely pro se notice of appeal on January 12, 2000, R1:28, and on February 11, 2000, the district court granted his motion to proceed on appeal in forma pauperis. R1:31. The court of appeals then declined to issue a COA and the appeal was dismissed on April 6, 2000. R1:32.

On November 7, 2000, the United States Supreme Court decided Artuz v. Bennett, 531 U.S. 4 (2000), which corrected lower court interpretations of how AEDPA's one-year limitations period is tolled. On April 6, 2001, the Eleventh Circuit Court of Appeals decided Delancy v. Florida Dept. of Corrections, 246 F.3d 1328, 1330 n.2 (11th Cir. 2001), acknowledging that Artuz changed the Eleventh Circuit law relating to the tolling of AEDPA's limitations period.

On July 30, 2001, Mr. Gonzalez filed a pro se Rule 60(b) Motion to Amend or Alter Judgment, based upon the changed law reflected in Artuz and Delancy. R1:33. Mr. Gonzalez's Rule

60(b) motion sought relief on the grounds of an intervening change in law, which established that the original habeas corpus petition was erroneously dismissed as procedurally barred. Without response from the state, the district court entered an Order Denying Motion to Amend and Closing Case, because, "Petitioner has already taken an appeal to the Eleventh Circuit. Accordingly, this Court no longer has jurisdiction over his claims." R1:34.

Mr. Gonzalez perfected a timely pro se appeal. R1:36. Although the district court denied a COA, R1:38, a judge of the court of appeals granted a COA as to the following issue:

> Whether the district court erred in dismissing appellant's habeas petition, 28 U.S.C. § 2254, as barred by the one-year statute of limitations provision in the Antiterrorism and Effective Death Penalty Act of 1996?

That same judge also decided that, due to the incomplete record before the court of appeals, it was premature to determine whether any of the substantive challenges raised in the § 2254 proceeding warrant a COA. Gonzalez v. Sec'y for Dept. of Corrections, 366 F.3d at 1261 (11th Cir. 2004). The COA was vacated by Order dated January 10, 2003, and the appeal was then dismissed. Id. The January 10, 2003, Order was vacated by the en banc court of appeals on April 1, 2003, and the original COA was vacated by the same Order, replaced with a request for the parties to brief four questions. At the same time, the en banc court of appeals appointed counsel to represent Mr. Gonzalez and consolidated his case with two other otherwise unrelated habeas cases – the case of Stephen A. Mobley, who filed a Rule 60(b)(3) motion following a § 2254 proceeding, and the case of Emil Lazo, who filed a Rule 60(b)(6) motion following a § 2255 proceeding – for the parties to brief and argue four questions common to each of the cases:

> 1. Is a certificate of appealability required before an appeal may be taken from the denial of a Rule 60(b) motion involving an order or judgment in a § 2254 proceeding?
>
> 2. If so, should one issue in this case?
>
> 3. What standards or rules should govern Rule 60(b) motions involving an order or judgment in a 28 U.S.C. § 2254 proceeding, i.e., under what circumstances, if any, should such a motion be granted?
>
> 4. Was it an abuse of discretion for the district court to deny the Rule 60(b) motion in this case?

Id. at 1256.[2]

Sitting en banc, the court of appeals determined that a certificate of appealability was required before proceeding on the petitioners' appeals, 366 F.3d at 1263, and granted a certificate of appealability in Gonzalez's appeal on the question, "What standards are applicable to Rule 60(b) in § 2254 cases, and in light of those standards was it an abuse of discretion for the district court to deny the motion?" 366 F.3d at 1268. The en banc court of appeals determined that Gonzalez's Rule 60(b) motion was properly denied because the district court lacked jurisdiction to hear a true Rule 60(b)(6) motion based on intervening change in law. Id. at 1281-82.

Statement of Facts

Mr. Gonzalez's Rule 60 (b) motion sought relief on the grounds of an intervening change in law, which established that his original habeas corpus petition was erroneously dismissed as procedurally barred. The two intervening decisions cited in the motion are Artuz v. Bennett, 531 U.S. 4 (2000) and Delancy v. Florida Dept. of Corrections, 246 F.3d 1328 (11th Cir. 2001). The state did not respond to Mr. Gonzalez's Rule 60(b) Motion to Amend or Alter Judgment and no evidentiary hearing was held before it was summarily dismissed by the district court for lack of jurisdiction.

---

[2] As to Emil Lazo, the questions were couched in terms of § 2255 proceedings.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals Erred in Holding That Every Rule 60(b) Motion (Other than Fraud under (b)(3)) Constitutes a Prohibited "Second or Successive" Petition as a Matter of Law, in Square Conflict with Decisions of this Court and of Other Circuits.

A. The Court Should Grant Certiorari to Resolve the Significant and Continuing Split Among the Circuits, Left Unanswered by Abdur'Rahman v. Bell, 537 U.S. 88 (2002), Over the Jurisdiction of District Courts to Entertain Fed. R. Civ. P. 60(b) Motions in Habeas Corpus Cases.

Although the Antiterrorism and Effective Death Penalty Act of 1996 says not one word about Federal Rule of Civil Procedure 60(b),[3] a debate has raged among the circuits about whether the law effectively repealed use of the nearly 70-year-old rule, which codifies the common-law and inherent powers of a court to reopen a judgment in a civil case, including a habeas corpus proceeding. Eight years after the passage of AEDPA, the federal circuits remain sharply divided on the availability of Fed. R. Civ. P. 60(b) motions to challenge the integrity of final orders entered in habeas corpus

[3] Federal Rule of Civil Procedure 60(b) provides, in part: "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment ... upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken."

proceedings.

In 2002, the Court undertook to address the split by granting certiorari to consider two questions:

> I. Whether the Sixth Circuit erred in holding, in square conflict with decisions of this Court and of other circuits, that every Rule 60(b) Motion constitutes a prohibited "second or successive" petition as a matter of law, and
>
> II. Whether a court of appeals abuses its discretion in refusing to permit consideration of a vital intervening legal development when the failure to do so precludes a habeas petitioner from ever receiving any adjudication on his claims on the merits.

Abdur'Rahman v. Bell, 535 U.S. 1016 (2002); see Abdur'Rahman v. Bell, 537 U.S. 88, 93 n.9 (2002) (STEVENS, J., dissenting). Ultimately, the Court dismissed the writ issued in that case as improvidently granted, due to procedural and jurisdictional concerns unique to that case. Id. at 89 ("The Court's decision to dismiss the writ of certiorari as improvidently granted presumably is motivated, at least in part, by the view that the jurisdictional issues presented by this case do not admit of an easy resolution.").[4]

The conflict and division among the circuits have grown since Abdur'Rahman was dismissed, culminating in the decision below – itself a split decision – which presents substantially

[4] Abdur'Rahman's complications were manifold. The petitioner filed in the district court a Rule 60(b) motion, but it was unclear if it was properly styled as a Rule 60(b) motion, or if it was actually an application to file a second or successive habeas corpus petition. The district court found the motion to be a second or successive habeas application over which it had no jurisdiction and transferred the motion to the court of appeals pursuant to 28 U.S.C. § 1631. In response, petitioner filed a notice of appeal and a request for a certificate of appealability. The court of appeals entered an order endorsing the district court's disposition of the Rule 60(b) motion, found that petitioner failed to meet the gateway requirements for a successive habeas application, and denied all relief. 537 U.S. at 94. Those circumstances caused collateral threshold concerns about the nature of the order under review and the jurisdiction of the Court to entertain further review of a denied certificate of appealability.

the same two issues as did Abdur'Rahman, without the procedural and jurisdictional complications present earlier. In the instant case, Mr. Gonzalez filed a "true Rule 60(b) motion," 366 F.3d at 1263; the motion was denied by order of the district court on the grounds it was without jurisdiction to entertain it, id. at 1261, R1:34; a certificate of appealability was granted for the court of appeals to review that decision, id. at 1268 ("What standards govern Rule 60(b) motions aimed at judgments in habeas proceedings, that is, when should those motions be granted?"); and the motion's denial was affirmed because the court of appeals held that Rule 60(b)(6) is not available to challenge the integrity of final orders in habeas corpus proceedings. Id. at 1281.

The holding of the Eleventh Circuit majority below is that AEDPA eviscerated all of Rule 60(b) in habeas corpus proceedings, except 60(b)(3), which provides relief for fraud occurring in the federal habeas corpus proceeding. The majority found that use of Rule 60(b) is "an attempted end-run[]" around the "second and successive petition" limitations imposed by AEDPA:

> In conclusion, a Rule 60(b) motion seeking to reopen the judgment in a § 2254 or § 2255 case should be denied by the district court, unless it is filed to correct a clerical mistake (meaning it is really a Rule 60(a) motion) or is filed pursuant to Rule 60(b)(3) to remedy a fraud agents of the government perpetrated on the federal court.

366 F.3d at 1257, 1285-86. All other portions of 60(b) are inoperable, including 60(b)(6), which has traditionally provided a means for relief from a habeas judgment founded on an error revealed by an intervening legal decision. Four members of the court of appeals, who all dissented, characterized the Gonzalez holding:

> [T]he majority holds today that, with the exception of the ground provided by Rule 60(b)(3), the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, precludes the district courts of the Eleventh Circuit from entertaining Rule 60(b) motions filed by prisoners who seek the vacation of the district court's judgment denying them habeas corpus relief.

366 F.3d 1287-88 (Tjoflat, J., specially concurring in part and dissenting in part) (internal footnotes

omitted); see id. at 1286 (Edmondson, C.J., specially concurring in part and dissenting in part); id. at 1310 (Barkett and Wilson, JJ., specially concurring in part and dissenting in part).

The Eleventh Circuit's bright line holding is in direct conflict with the decisions of seven federal courts of appeals, which reject a bright line in favor of a case-by-case approach, analyzing the substance of each Rule 60(b) motion to determine if the motion is permissible: Rodwell v. Pepe, 324 F.3d 66, 70-71 (1st Cir.), cert. denied 124 S. Ct. 224 (2003) (holding that Rule 60(b) motion is available when it "deals primarily with some irregularity or procedural defect" of the habeas proceeding itself); Rodriguez v. Mitchell, 252 F.3d 191 (2d Cir. 2001) (holding that Rule 60(b) relief is available when the motion attacks the integrity of the habeas corpus proceeding); United States v. Weinstock, 340 F.3d 200, 206-07 (4th Cir.), cert. denied, 124 S. Ct. 496 (2003) (holding that not all Rule 60(b) motions are successive applications; each case should be analyzed based on the nature of the claims presented); Dunlap v. Litscher, 301 F.3d 873, 876 (7th Cir. 2002) (allowing Rule 60(b) motion to reopen previous habeas case as long as the substance of the motion does not pertain to "territory occupied by AEDPA "), cert. denied sub nom., Lanzotti v. United States, 537 U.S. 1140 (2003), cert. denied sub nom., Hunt v. United States, 537 U.S. 1234 (2003), cert. denied sub nom., Dunlap v. Frank, 123 S. Ct. 2644 (2003); Boyd v. United States, 304 F.3d 813, 814 (8th Cir. 2002) (per curiam) (directing district courts to conduct "a brief initial inquiry to determine whether the allegations in the Rule 60(b) motion in fact amount to a second or successive collateral attack" in which case the motion should be denied as barred or transferred to the court of appeals for certification); Thompson v. Calderon, 151 F.3d 918, 921 & n.3 (9th Cir.1998) (en banc) (holding that a Rule 60(b) motion ordinarily "should be treated as a successive habeas petition," but declining to adopt "a bright line rule equating all Rule 60(b) motions with successive habeas petitions"). Even

the Fifth Circuit, which appears to take a dim view of using a Rule 60(b) motion to set aside the denial of habeas, has expressly declined to decide whether such Rule 60(b) motions are always successive habeas petitions. Hess v. Cockrell, 281 F.3d 212, 215 (5th Cir.2002).[5] Indeed, four judges of the Eleventh Circuit, including Chief Judge Edmondson and former Chief Judge Tjoflat, part company with the other judges of that en banc court, concluding that its bright line rule prohibiting use of Rule 60(b)(6) is wrong and that Mr. Gonzalez should be permitted to proceed under the rule. Gonzalez, 366 F.3d at 1286-87 (Edmondson, C.J., dissenting as to Gonzalez); id. at 1287-1310 (Tjoflat, J., dissenting as to Gonzalez); id. at 1310 (Barkett and Wilson, JJ., dissenting as to Gonzalez).

Although contrary to the rule of seven circuits, the Eleventh Circuit's Gonzalez decision is consistent with the extreme position taken by two other circuits, the Tenth, Lopez v. Douglas, 141 F.3d 974, 975 (10th Cir. 1998) (per curiam), and the Sixth, McQueen v. Scroggy, 99 F.3d 1302, 1335 (6th Cir. 1996), which hold that regardless of the substance of the allegations, a Rule 60(b) motion is always a second or successive habeas petition under AEDPA.

The conflict among the circuits was reinforced one week after the Eleventh Circuit's ruling in Gonzalez, when the Second Circuit rejected the Eleventh Circuit's approach and reiterated its contrary view in Harris v. United States, 367 F.3d 74, 79 & n.3 (2d Cir. 2004) ("since the Rule 60(b)[6] motion arguably attacks the integrity of Harris's habeas proceeding, we must consider its merits"). Two weeks later, the Fourth Circuit renewed its conflict with the Eleventh Circuit, by

[5] The position of the Third Circuit is not clear. See United States v. Edwards, 309 F.3d 110, 113 (3d Cir.2002) (per curiam) (holding that motion for reconsideration "would be construed not as a Rule 60(b) motion, but, rather, as an unauthorized successive motion under § 2255,which the District Court may have been without jurisdiction to consider").

rejecting a bright line rule, holding instead that a true Rule 60(b)(6) motion is jurisdictionally cognizable: "[A] motion seeking a remedy for some defect in the collateral review process will generally be deemed a proper motion to consider." Reid v. Angelone, 369 F.3d 363, 375 (4th Cir. 2004) (vacating order denying mixed Rule 60(b) motion including both successive and true issues, permitting petitioner to elect to proceed only on true 60(b)(6) issue). And the circuit conflict entrenched still further earlier this month, when the Ninth Circuit again refused to apply a bright line rule forbidding habeas petitioners to utilize Rule 60(b)(6), holding instead that a "district court should have treated [a habeas petitioner's] motion solely as a 60(b)(6) motion and not as a second or successive petition under ... 'AEDPA'[]." Hamilton v. Newland, ___ F.3d ___ , 2004 WL 1470516 (9th Cir. July 2, 2004). In Hamilton, as in many of the earlier circuit decisions, the dramatic split among the circuits was recounted:

> Courts have struggled with the issue of when a Rule 60(b) motion brought by a habeas petitioner should be treated as a second or successive petition. Three schools of thought have emerged; some courts have decided that Rule 60(b) motions are never second or successive petitions; others have decided that they always are; and still others have taken a moderate approach that proceeds with a case by case examination of the relief sought in the Rule 60(b) motion.

Id. at *1.

Seven circuits refuse to draw a bright line rule prohibiting use of Rule 60(b) in habeas corpus cases. Two circuits have drawn a red line around the territory of Rule 60(b), prohibiting its traditional role, regardless of the allegations of the motion. One circuit has contoured a red line to eliminate all of Rule 60(b) (except fraud under 60(b)(3)), regardless of the motion's allegations. The divisions that appeared during the pendency of Abdur'Rahman continue unabated. The time is ripe for the Court to again address this important split in habeas corpus law.

Aurelio Gonzalez's petition is the ideal case for confronting the circuit split. Gonzalez was

denied any habeas corpus review, even though he filed a timely petition under 28 U.S.C. § 2254 including two issues meriting habeas corpus relief.[6] He was denied habeas corpus review due solely to the district court's pre-Artuz v. Bennett erroneous computation of the statute of limitations under AEDPA. He was denied appellate review of that error, due solely to the district court's and court of appeals' refusal to issue a certificate of appealability on that question, which refusal was based on an erroneous interpretation of AEDPA's COA requirement, pre-Slack v. McDaniel, 529 U.S. 473 (2000). This Court's intervening decisions in Artuz and Slack make clear that both the district court's dismissal and the court of appeals' refusal to grant a COA were wrongly decided, effectively depriving Mr. Gonzalez of the habeas corpus review to which he was entitled under 28 U.S.C. § 2254. When Mr. Gonzalez filed a Rule 60(b)(6) motion to reopen his habeas corpus proceeding, due to the intervening change of law, the district court denied that motion and the court of appeals affirmed the denial, holding as a matter of law that any Rule 60(b)(6) motion constituted a prohibited second or successive petition. Mr. Gonzalez was left, therefore, without any adjudication of the merits the claims made in his habeas corpus petition.

---

[6] As amended, the petition for writ of habeas corpus set forth two claims of facial merit: (1) Mr. Gonzalez's state guilty plea was involuntary because it was induced by untrue information about the relatively short time he would likely serve (13 years) on a 99-year sentence. Such a claim, if established, supports a writ of habeas corpus. See Finch v. Vaughn, 67 F.3d 909 (11th Cir. 1995) (due process requires vacating state defendant's guilty plea, induced by counsel's misadvice about concurrency of sentences, as not voluntary, intelligent and knowing plea). "[W]hen 'the defendant pleads guilty on a false premise' ... a guilty plea violates the Due Process Clause." Id. at 914 (quoting Mabry v. Johnson, 467 U.S. 504, 509 (1984)); (2) Mr. Gonzalez was sentenced based upon an inaccurate criminal history, which included convictions of other persons mistakenly thought to be him. Such an error at sentencing implicates a constitutional due process violation. Townsend v. Burke, 334 U.S. 736, 740- 41 (1948) (due process requires that sentence be based only on accurate information); see United States v. Tucker, 404 U.S. 443, 447 (1972) (reversal required where "sentence founded at least in part upon misinformation of constitutional magnitude").

B. The Gonzalez Decision's Bright Line Prohibition of Rule 60(b)(6) Jurisdiction In Habeas Corpus Cases Is Wrong, As Are the Decisions of the Sixth and Tenth Circuits, in Rejecting the Case-by-Case Jurisdiction Granted by Seven Other Circuit Courts of Appeals.

Chief Judge Edmondson's separate opinion captured the analytical framework required to decide the question presented:

> In these appeals, we are called upon to clarify the interaction of two laws which Congress has approved: Fed.R.Civ.P. 60 and AEDPA. As I understand our duty in such instances, we must give each all the force that we can. See, e.g., Reg'l Rail Reorganization Act Cases, 419 U.S. 102, 95 S.Ct. 335, 354, 42 L.Ed.2d 320 (1974) ("A new statute will not be read as wholly or even partially amending a prior one unless there exists a positive repugnancy between the provisions of the new and those of the old that cannot be reconciled.") (emphasis added).

366 F.3d at 1286 (Edmondson, C.J, specially concurring in part and dissenting in part). Concerned that the Gonzalez decision failed in that duty because it wrongly substituted its own judicial view in the place of Congress' explicit enactment of Rule 60(b), he took issue with the majority:

> [F]ederal judges are not the rightful makers of policy in this sphere. And we cannot properly favor what is convenient over what is true. And what, to me, is truly required jurisprudentially in a case like this one is the approach that gives both of the laws Congress has approved their fullest possible force.

Id.

Although AEDPA makes no reference to Rule 60(b) and expresses no limitations on its use in habeas corpus proceedings, the en banc court of appeals nevertheless created a bright line prohibition on the use of all of Rule 60(b) in such cases (except fraud under 60(b)(3)). Unable to identify an explicit Congressional countermand of its previous adoption of Rule 60(b), the court of appeals instead constructed its own premise and conclusion – "[the] central purpose of the AEDPA and its provisions specifically restricting the filing of second or successive petitions severely limit the application of Rule 60(b) to habeas cases." 366 F.3d at 1269 – then attempted to support it by

assembling other rules and laws that also say nothing about Rule 60(b). Implicitly acknowledging the shaky foundation for its conclusion, the majority further informed its viewpoint, misapplying as supporting precedent the Court's unrelated and inapposite decision in Calderon v. Thompson, 523 U.S. 538 (1998). Chief Judge Edmondson explained the obvious criticism of that approach:

> The Supreme Court's decision in Calderon, I think, does not control the present cases. In Calderon, the Court did not deal with Rule 60 and was not governed by AEDPA; so, the Supreme Court did not grapple (as we do now) with the duty to give the fullest possible credit to two different laws, each of which Congress had approved. I cannot agree that extending Calderon – an inherent-judicial-powers case in which the Supreme Court acted not only as interpreter of laws, but also as supervisor of lower courts – is either necessary or proper for the present appeals.

Gonzalez, 366 F.3d at 1286.

As explained more fully below, the court of appeals' holding is inconsistent with the analytical framework used by this Court in post-judgment review of habeas corpus cases denied or dismissed on procedural grounds, improperly applies this Court's decision in Calderon v. Thompson, and violates both the Due Process Clause of the Fifth Amendment and the Suspension of the Writ Clause of U.S. Const. art. I sec. 9.

(1) Applying 28 U.S.C. § 2244(b)(1)'s Successive Application Bar as a Bright Line Prohibition of Rule 60(b)(6) Jurisdiction Is Contrary to the Court's Precedents, Which Carefully Avoid Conflict with the Fifth Amendment's Due Process Clause and the Suspension of the Writ Clause of U.S. Const. art. I sec. 9.

When a literal reading of AEDPA would collide with the Constitution, the Court has read the language differently, or seized upon Congressional silence or AEDPA's incorporated habeas corpus jurisprudence, to avoid the collision. Three illustrations of this analytical approach are Slack

v. McDaniel, 529 U.S. 473, Felker v. Turpin, 518 U.S. 651 (1996), and Martinez-Villareal v. Stewart, 523 U.S. 637 (1998).

In Slack, the Court refused to allow the specific language of AEDPA – "§ 2253(c)'s requirement that a COA may issue only upon the 'substantial showing of the denial of a constitutional right'" – to prevent appeal of a dismissal based on purely procedural grounds. The state in Slack had pointed to the apparently-plain language of AEDPA, but the Court rejected that approach, balancing AEDPA's harsh result against the importance of correctly decided habeas corpus proceedings:

> According to the State, only constitutional rulings may be appealed. Under this view, a state prisoner who can demonstrate he was convicted in violation of the Constitution and who can demonstrate that the district court was wrong to dismiss the petition on procedural grounds would be denied relief. We reject this interpretation. The writ of habeas corpus plays a vital role in protecting constitutional rights. In setting forth the preconditions for issuance of a COA under § 2253(c), Congress expressed no intention to allow trial court procedural error to bar vindication of substantial constitutional rights on appeal.
>
> Our conclusion follows from AEDPA's present provisions, which incorporate earlier habeas corpus principles.

529 U.S. at 483. Faced with a constitutional collision between AEDPA and a prisoner's right of habeas review, the Court chose to avoid the collision by interpreting the statute's limitations to fit within what the Constitution permits, allowing a COA for procedural dismissals, without the need to demonstrate an appellate issue of constitutional dimension. Where the apparent language of AEDPA leads to an unconstitutional result, the Court looked instead to the earlier habeas corpus jurisprudence incorporated in the statute.

This same approach drove the Court's decision in Felker v. Turpin. Rather than interpret AEDPA's apparently-plain language prohibiting Supreme Court jurisdiction to violate the

Exceptions Clause of Art. III, § 2, or the Suspension Clause of Art. I, § 9 of the Constitution, the Court read the law to "not preclude this Court from entertaining an application for habeas corpus relief ... thereby obviat[ing] any claim by petitioner under the Exceptions Clause ... and ... the Suspension Clause... ." 518 U.S. 654. Its decision relied in large part upon Congressional silence about the fate of prior habeas corpus jurisprudence, despite an express statutory directive:

> [W]e conclude that Title I of the Act has not repealed our authority to entertain original habeas petitions, for reasons similar to those stated in [Ex parte] Yerger, 8 Wall. 85, 19 L.Ed. 332 (1869). No provision of Title I mentions our authority to entertain original habeas petitions; in contrast, § 103 amends the Federal Rules of Appellate Procedure to bar consideration of original habeas petitions in the courts of appeals. Although § 2244(b)(3)(E) precludes us from reviewing, by appeal or petition for certiorari, a judgment on an application for leave to file a second habeas petition in district court, it makes no mention of our authority to hear habeas petitions filed as original matters in this Court. As we declined to find a repeal of § 14 of the Judiciary Act of 1789 as applied to this Court by implication then, we decline to find a similar repeal of § 2241 of Title 28–its descendant–by implication now.

518 U.S. 660-61 (footnotes omitted). As in Slack, Felker avoided constitutional collision by refusing to permit prohibitions in AEPDA that the Constitution does not tolerate.

Similarly, in Martinez-Villareal v. Stewart, 523 U.S. 637 (1998), the Court refused to construe a second habeas petition as being second or successive even though the ground raised – competency to be executed – had been raised in the original petition. Rather than read the second and successive ban literally, at the expense of a first habeas corpus ruling on the issue (implicating constitutional concerns), the Court instead seized upon the fact that the district court never ruled on the merits of the original claim. This allowed the Court to find that the second filing was not successive and permitted the claim to be heard, despite the apparent statutory prohibition.

Interpreting AEDPA to fit within the Constitution, rather than interpreting it at an unconstitutional face value, has been the Court's accepted approach. And it is this analytical

framework on which other circuits have relied in determining the continuing viability of Rule 60(b)(6). To this end, Rule 60(b) motions relying on new legal developments that reveal pre-existing law with which a habeas judgment arguably conflicts have been consistently treated as non-successive. Blackmon v. Money, 531 U.S. 988 (2000) (mem.), on remand, 27 Fed. Appx. 543 (6th Cir. 2001) (denial of 60(b) motion for relief from unappealed, with-prejudice dismissal as untimely is remanded for reconsideration in light of Artuz v. Bennett, construing AEDPA's statute of limitations in a way that could make Blackmon's dismissed petition timely); Thomas v. Roe, 23 Fed. Appx. 847 (9th Cir. 2001) (granting 60(b) relief from unappealed, with-prejudice dismissal of habeas petition after Artuz revealed that dismissing the petition as untimely was arguably in error); see Guyton v. United States, 23 Fed. Appx. 539, 540 (7th Cir. 2001) (dicta) (Rule 60(b) motion may be used to reopen a with-prejudice dismissal, as untimely, of a 2255 motion that clearly was timely under recent cases applying the "prison mailbox rule" to federal prisoners); see also Cornell v. Nix, 119 F.3d 1329, 1332 (8th Cir. 1997) ("'A post-judgment change in the law having retroactive application may ... constitute an extraordinary circumstance warranting vacation of a judgment' [in a] habeas corpus proceeding.").

Using the Court's analytical approach, Muniz v. United States, 236 F.3d 122 (2d Cir. 2001), effectively undercut the Eleventh Circuit's bright-line formulation. Muniz filed a timely 2255 application within one year of AEDPA's effective date, but more than a year after his conviction became final. His petition was incorrectly dismissed as untimely. Before his appellate rights expired, the Second Circuit decided two cases that construed a grace period within AEDPA's time limitation, which would have made Muniz's application timely. But Muniz's COA was denied and his out-of-time appeal was dismissed. The Second Circuit held that Muniz's subsequent 2255 petition (raising

the new cases on timeliness) was not a "second or successive" application. The Court of Appeals noted that "constitutional implications" preclude application of the AEDPA's second or successive provisions in cases where the initial application was erroneously dismissed due to judicial error. Muniz v. United States, 236 F.3d at 127-29. "Because 'a dismissal of a first habeas petition for technical procedural reasons would bar the petitioner from ever obtaining federal habeas review,' excusing a prior petition from 'counting' as a first petition in such cases avoids serious constitutional questions arising under the Suspension Clause." Id., quoting Martinez-Villareal v. Stewart, 523 U.S. 637.

Lower federal courts have also followed this analytical formulation. For example, in both Tal v. Miller[7] and Reinoso v. Artuz,[8] courts granted Rule 60(b) motions to reopen habeas corpus proceedings that had been dismissed based upon an incorrect reading of the tolling and grace period allowed by AEDPA. The decisions are well-conceived, grounding 60(b) relief upon precedent of the Supreme Court and the Second Circuit:

> [A] procedural dismissal "of a first habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty. ... Given the importance of a first federal habeas petition, it is particularly important that any rule that would deprive inmates of all access to the Writ should be both clear and fair." [Ross v. Artuz, 150 F.3d 97, 100 (2d Cir. 1998)] (quoting Lonchar v. Thomas, 517 U.S. 314 (1996).

1999 U.S. Dist. LEXIS 652 at *9 (alternative citations omitted). Indeed, Lonchar holds specifically that ad hoc variance from the law, rules and precedents governing habeas corpus, even if based upon equitable principles, constitutes error, particularly where, as here, dismissal of a first habeas petition

[7] 1999 U.S. Dist. LEXIS (S.D. N.Y. Jan 27, 1999)

[8] 1999 U.S. Dist. LEXIS (S.D. N.Y. May 25, 1999)

is at issue. 517 U.S. at 1299. To adopt the Eleventh Circuit's view is to necessarily reject the Supreme Court's holding and reasoning in Lonchar, permitting ad hoc equities to override the written rules governing habeas practice.

In addition, a plain understanding of Rule 60(b) demonstrates that a motion under it is not a second or successive habeas petition. Judge Tjoflat's dissent in Mobley v. Head, 306 F.3d 1096, 1105 (11th Cir. 2002) (vacated panel decision), cited extensively in Justice Stevens' dissent in Abdur'Rahman v. Bell, 537 U.S. 88, explains why a Rule 60(b) proceeding is not a second or successive habeas application:

> [A] motion for relief under Rule 60 of the Federal Rules of Civil Procedure contests the integrity of the proceeding that resulted in the district court's judgment" – "a rule 60(b) motion is designed to cure procedural violations in an earlier proceeding – here a habeas corpus proceeding – that raise questions about that proceedings's integrity.

Id. Put another way, a Rule 60(b) motion in a § 2254 case is designed to remedy unfairness in the federal habeas proceedings; it does not address directly the underlying state court proceedings that are otherwise the subject of the habeas lawsuit. A proper Rule 60(b) motion in a § 2254 case thus involves allegations that the federal court judgment was tainted because of some error infecting proceedings held in a federal court lawsuit the subject of which is alleged unfairness in a state court criminal trial. See Rodwell v. Pepe, 324 F.3d 66 (Rule 60(b) motion should be considered as such in habeas cases if "the factual predicate set forth in support of the motion attacks only the manner in which the earlier habeas judgment has been procured...").

Overlooking Congressional silence on Rule 60(b), refusing to acknowledge the Court's analytical approach in interpreting AEDPA, or the plain-language distinction between a Rule 60(b) motion and a habeas application, the Eleventh Circuit holds that AEDPA repealed virtually all of Rule 60(b) for use by a prisoner in a habeas corpus proceeding, claiming that Rule 60(b) motions

(other than 60(b)(3)) filed by defendants are "second or successive," prohibited by AEDPA. The fact that the Eleventh Circuit's holding is based on judicial fiat rather than Congressional legislation is pointedly revealed both in Chief Judge Edmondson's separate opinion, 366 F.3d at 386, and in the complete disagreement between Judge Carnes' bright line formulation (for the majority) and Judge Tjoflat's contrary rule (for the dissenters). One thing is very clear, Congress did not write one whit about limiting Rule 60(b), even though the rule had been in effect and in use for over a half-century by the time AEDPA was adopted. Congress' only rule is written in Rule 60(b), while the battling rules of the Eleventh Circuit judges are both manufactured of whole cloth.

The bright line rule created by the Eleventh Circuit is simply legislating by judicial fiat, an approach rejected by the majority of courts, and inconsistent with Supreme Court jurisprudence, particularly where its light does not originate from the written law, rules, or applicable precedents of the Court. It should be rejected in favor of the case-by-case approach favored by the majority of courts.

(2) The Eleventh Circuit's Bright Line Prohibition of Rule 60(b) Jurisdiction Erroneously Replaces the Rule 60(b) Standard for Relief With a Formulation Developed in the Inapposite Decision of Calderon v. Thompson.

As part of its repeal of Rule 60(b), the Eleventh Circuit attempted to analogize Calderon v. Thompson, thereby replacing Rule 60(b)'s specific provisions for relief with Calderon's miscarriage of justice standard. Calderon is both procedurally and substantively distinct, making it an inappropriate source to support the court of appeals' holding and its newly created standard of relief.

Rule 60(b) has six grounds for relief, fortified with an extensive body of jurisprudence. See

Wright, et al., Federal Practice and Procedure: Civil 2d §§ 2851-2873; 28 U.S.C.A. Fed. R. Civ. P. 57-60. The rule derives from the common-law and inherent powers of a court, but was codified in a rule-making process involving the Supreme Court and Congress. 366 F.3d at 1289-91 (Tjofalt, J., dissenting). According to the rule and the many cases interpreting it, Rule 60(b) relief is granted in the discretion of the district court, based upon one of the six enumerated grounds and exceptional circumstances. Id.; see Klapprott v. United States, 335 U.S. 601 (1949).

The authority of an appellate court to recall its mandate, on the other hand, is debatable, Calderon, 523 U.S. at 549, and is not codified by statute or rule. To the extent it is recognized at all, it is a remedy "of last resort, held in reserve against grave, unforseen contingencies." Id. Due to a paucity of rules or jurisprudence of its own, the standards for recall an appellate mandate must necessarily be informed by other rules and law. Id.

Calderon v. Thompson involved the propriety of an appellate court recalling its mandate to "revisit the merits of its earlier decision" about a prisoner who "already had extensive review of his claims in federal and state courts." 523 U.S. at 557. Thompson's "extensive review" included litigation on the merits of his claims in at least six separate proceedings, and a plenary appeal of a merits decision based on a federal habeas corpus evidentiary hearing. 523 U.S. 545-46. Mr. Gonzalez, on the other hand, has never had a hearing, in state or federal court; has never had an evidentiary hearing, in state or federal court; had his first federal habeas petition erroneously dismissed without consideration of the merits of his claims; and was denied an appeal of that error by the restrictions of AEDPA and a misinterpretation of the COA requirement by the lower courts, pre-Slack v. McDaniel.

The vehicle by which Thompson sought relief, recall of a mandate, is rarely exercised by

appellate courts, the authority for the process is questionable, and there are neither rules, statutes, nor a body of jurisprudence by which to judge its use. This Court was compelled, therefore, to inform its decision by analogous jurisprudence. To the contrary, Mr. Gonzalez's remedy of choice is a common legal procedure, the authority for which is recognized by rule and a rich body of jurisprudence. Determining the proper application of Rule 60(b) can be accomplished through its own jurisprudence, so resort to analogy is unnecessary. Moreover, resort to the analogy of Calderon v. Thompson conflicts with the established principles of Rule 60(b), as well as the Court's analytical approach to habeas corpus proceedings that have been terminated on procedural grounds, not on the merits.

The posture of Mr. Gonzalez's case suggests that the better case for analogy is Slack v. McDaniel, in which this Court carved out special considerations for habeas cases reaching a court of appeals after a dismissal on procedural grounds. Despite the express language of AEDPA, the Court chose to treat the COA requirement for procedural dismissals differently than for cases decided on the merits. Recognizing that the alternative left petitioners without habeas review or an appeal of that decision, the Court treated procedurally dismissed cases to a special rule, designed to ensure appellate review even where no constitutional appellate issue is present. It did not adopt the harsh miscarriage of justice approach – permitting review only in cases of actual innocence – but rather it recognized that procedurally dismissed cases have never had a merits determination in which miscarriage of justice could be demonstrated. Weighing the importance of the Writ's role in ensuring justice under our Constitution against potential abolition of that process for procedurally dismissed cases, the Court opted in favor of a less demanding, not more demanding, standard.

The difference between Rule 60(b) jurisprudence and the miscarriage of justice jurisprudence

is vast. In the former case, a wide variety of grounds other than fraud and actual innocence are cognizable, while in the latter case only actual innocence or fraud are cognizable as grounds for relief. It is implausible that Congress intended to delete five of the six paragraphs of Rule 60(b) without ever saying a word on the subject. It is equally implausible that Supreme Court precedents, which take pains to ensure that erroneous habeas corpus procedural decisions will remain open to review (even if lacking appellate issues of constitutional dimension), are to be ignored in favor of a more restrictive miscarriage of justice jurisprudence to inform (override) the specific requisites of Rule 60(b).

Mr. Gonzalez invoked one of Rule 60(b)(6)'s grounds for relief, an intervening change (correction) in the interpretation of the law, coupled with exceptional circumstances. This ground does provide relief under the law governing Rule 60(b)(6), but it does not meet the miscarriage of justice rule the Eleventh Circuit "borrowed from Calderon....." 366 F.3d at 1281. See infra at 28 n.9.

The Eleventh Circuit's formulation of a bright line rule violates both the Due Process Clause of the Fifth Amendment and, in a separate context, the Suspension of the Writ Clause of U.S. Const. art. I sec. 9, something the Court has taken pains to avoid. Lonchar v. Thomas, 517 U.S. 314, 324 (1996) ("Dismissal of a first federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty."). As the Court cautioned in Lonchar, to protect the continuing viability of the Great Writ, lower courts are bound to follow the established law, and are "not authorize[d] ... to ignore this body of statutes, rules and precedents," a caution the Eleventh Circuit did not heed.

AEDPA neither requires this Court to abandon the plain language of Rule 60(b) and its interpretive caselaw, nor does it require the Court to replace that rule and law with another body of

law unrelated to the rule's context. The Rule 60(b) proceeding is freestanding, merely a means to reopen a judgment, not a part of the original habeas corpus proceeding. Abdur'Rahman, 537 U.S. at 88, 93 ("It merely ask[s] the District Court to set aside its 1998 order terminating the habeas corpus proceeding and to decide the merits of the ... claim that had been procedurally barred."). So it makes little sense to apply the habeas corpus standard of relief – miscarriage of justice – to the Rule 60(b) context, which speaks not to the merits of a habeas claim, but merely whether the merits should be reconsidered. Id. This argument is enhanced here, where Mr. Gonzalez was precluded from demonstrating anything, a miscarriage of justice or anything else, due to the district court's erroneous dismissal of the habeas corpus case before any of the underlying merits were heard.

II. A Court of Appeals Abuses its Discretion in Refusing to Permit Consideration of a Vital Intervening Legal Development When the Failure to Do So Precludes a Habeas Petitioner from Ever Receiving Any Adjudication on His Claims on the Merits.

Mr. Gonzalez filed a timely federal habeas corpus petition, raising claims of facial merit, which constitute grounds for granting of the Writ. See supra at 15 n.6. His timely habeas corpus petition was improperly terminated by the district court, which misconstrued and miscalculated AEDPA's limitations period. He was deprived of any appeal of that error due to the court of appeals' erroneous construction of AEDPA's gatekeeping certificate of appealability requirement (decided pre-Slack v. McDaniel, when the Eleventh Circuit Court of Appeals still required a constitutional issue for issuance of a COA, even for procedural dismissals). See Delancy v. Florida Dept. of Corrections, 246 F.3d 1328 (11th Cir. 2001).

The combination of AEDPA legislation and erroneous court rulings deprived Mr. Gonzalez

of habeas review to which he was entitled and appellate review to correct that error, ultimately effecting an arbitrary and complete denial of the statutory right of habeas corpus review, suspending the Writ, and denying the most basic precepts of procedural due process. Once this Court, in Artuz v. Bennett, corrected the legal interpretation of the previously misconstrued AEDPA limitations period, Rule 60(b)(6) was the only available procedural device to prevent injustice and remedy the due process violation.[9] To permit another provision of AEDPA – or the spirit of AEDPA – to effectively repeal, sub silentio, Rule 60(b)(6) jurisdiction again suspends the Writ and denies procedural due process, something the Court's precedents have been cautious to avoid. By failing to honor these precepts, the lower courts abused discretion.

(A) The Due Process Clause of the Fifth Amendment Prohibits Any Interpretation of Rule 60(b)(6) That Deprives a Habeas Petitioner of His Entitlement to a Timely Filed First Federal Habeas Corpus Proceeding.

A habeas petitioner, such as Mr. Gonzalez, has a statutory right to a single federal habeas corpus review of his state imprisonment. 28 U.S.C. § 2254. Denial of that right violates the Fifth Amendment's assurance of procedural due process.

The right of federal habeas corpus is effected by statute, created by Congress, beginning with the Judiciary Act of 1789. Having created that right, it is subject to the constitutional dictates of the Due Process Clause. See Evitts v. Lucey, 469 U.S. 387 (1984) (denial of statutory entitlement to

---

[9] The intervening limitations decision of the Supreme Court, Artuz v. Bennett, on which Mr. Gonzalez relies to show his habeas petition was improperly dismissed as untmely, does not rise to the level necessary to permit the filing of a second or successive habeas application. It does not involve a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court," nor does his claim involve newly discovered facts "sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." See 28 U.S.C. § 2244(b).

direct appeal requires procedural due process); Morrissey v. Brewer, 408 U.S. 471 (1972) (denial of statutory entitlement to be considered for discretionary parole requires procedural due process); Goldberg v. Kelly, 397 U.S. 254, 263 (1970) (denial of statutory entitlement to welfare benefits subject to procedural due process); Fuentes v. Shevin, 407 U.S. 67 (1972) (denial of property under prejudgment replevin statute requires procedural due process).[10] It matters not that the proceeding derives from a statute, as opposed to a constitutionally-mandated procedure. Procedural due process inheres in statutory rights, as well. As Justice Frankfurter stated in Anti-Fascist Committee v. McGrath, 341 U.S. 123 (1951):

> From a great mass of cases, running the full gamut of control over property and liberty, there emerges the principle that statutes should be interpreted, if explicit language does not preclude, so as to observe due process in its basic meaning. ... Fair hearings have been held essential for rate determinations and, generally, to deprive persons of property. An opportunity to be heard is constitutionally necessary to deport persons even though they make no claim of citizenship, and is accorded to aliens seeking entry in the absence of specific directions to the contrary. Even in the distribution by the Government of benefits that may be withheld, the opportunity of a hearing is deemed important.

Id. at 165 (Frankfurter, J., concurring) (internal citations and footnotes omitted). Since Justice Frankfurter made those observations, the Court has recognized that other statutory proceedings require procedural due process, such as the statutory rights to appeal a criminal case (Evitts), to parole (Morrissey), to welfare benefits (Goldberg), and the right to not lose "a stove, a stereo, a table and a bed" to prejudgment replevin (Fuentes). Like replevin statutes, the federal habeas corpus

[10] Procedural due process of law is guaranteed by both the Fifth and Fourteenth Amendments. Although the latter is only applied to the states, procedural due process has identical meanings under both amendments. See Bloom v. Illinois, 391 U.S. 194, 195 (1968) (applying procedural due process protection to contempt proceedings: "The Fifth and Fourteenth Amendments forbid both the Federal Government and the States from depriving any person of 'life liberty, or property, without due process of law.").

statute "descend[s] from the common-law ... of six centuries ago." 407 U.S. at 79. Just as the statutory iteration of replevin proceedings is governed by procedural due process, so too is the statutory iteration of federal habeas corpus proceedings.

That procedural due process is required in a first federal habeas corpus petition is best seen in the parallel case of a direct appeal. Both rights are statutory.[11] In Evitts v. Lucey, the Supreme Court applied the constraints of procedural due process to the statutory right of appeal, explaining:

> The right to appeal would be unique among state actions if it could be withdrawn without consideration of applicable due process norms. For instance, although a State may choose whether it will institute any given welfare program, it must operate whatever programs it does establish subject to the protections of the Due Process Clause. See Goldberg v. Kelly, 397 U.S. 254 (1970). Similarly, a State has great discretion in setting policies governing parole decisions, but it must nonetheless make those decisions in accord with the Due Process Clause. See Morrissey v. Brewer, 408 U.S. 471, 481-484 (1972). See also Graham v. Richardson, 403 U.S. 365, 374 (1971); Bell v. Burson, 402 U.S. 535, 539 (1971); Sherbert v. Verner, 374 U.S. 398, 404 (1963); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 165-166 (1951) (Frankfurter, J., concurring). In short, when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution–and, in particular, in accord with the Due Process Clause.

469 U.S. 400-01 (alternate citations omitted).

Congress has conferred by statute the right of a criminal defendant to a direct appeal. 28 U.S.C. § 1291. Congress has conferred by another statute, 28 U.S.C. § 2254, the right of a state prisoner to a single habeas corpus proceeding in federal court. Both rights protect liberty, ensuring that claims of unjust imprisonment are heard. Both rights have time limitations within which they

[11] Although habeas corpus also has constitutional derivations, U.S. Const. art. I sec. 9 (Suspension Clause), the right to appeal a criminal conviction is purely statutory, not based on a constitutional right. Abney v. United States, 431 U.S. 651, 656 (1977). In this sense, the application of procedural due process to a federal habeas corpus proceeding is at least as compelling as it is to a direct appeal.

must be perfected. Yet, if properly perfected, neither proceeding can be negated without due process of law.

Certainly, if proceedings to keep household goods, obtain parole or welfare benefits, or have an appeal, must be "in accord with the dictates of the Constitution – and in particular, in accord with the Due Process Clause," 469 U.S. at 400-01, then procedural due process must apply with equal force to federal habeas corpus proceedings. This means that a first habeas corpus proceeding, a legal proceeding derived of a statutory entitlement, cannot be negated without procedural due process. To terminate a habeas corpus proceeding arbitrarily and erroneously, without according the merits determination Congress prescribes, violates the Constitution's requirement of procedural due process. This point was made implicitly by the Court in Lonchar v. Thomas, which cautioned lower courts that current statutory habeas corpus derives from the Great Writ and dismissing petitions for the writ requires obedience to the caselaw, statutes, and rules governing it: "[T]he history of the Great Writ of Habeas Corpus reveals, not individual judges dismissing writs for ad hoc reasons, but, rather the evolution of more formal judicial, statutory, or rules-based doctrines of law. ... And the argument against ad hoc departure from the settled rules would seem particularly strong when dismissal of a first habeas petition is at issue" Id. at 322, 324. As the Lonchar Court concluded, "Dismissal of a first habeas corpus petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." Id.

Here, Aurelio Gonzalez has been denied a ruling on the merits of his first habeas petition, even though he perfected a timely petition of substantive merit. By virtue of the Eleventh Circuit's bright line rule, he is now jurisdictionally deprived of reopening the lower court's defective

judgment. The arbitrariness of the rulings violates due process of law.

(B) The Eleventh Circuit's Bright Line Rule Interpreting AEDPA as Repealing, Sub Silentio, Rule 60(b)(6) in Habeas Corpus Cases Violates The Suspension of the Writ Clause of U.S. Const. art. I sec. 9

Article I, section 9 of the U.S. Constitution provides that, "The Privilege of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it." Mr. Gonzalez's right to the Great Writ has been suspended by AEDPA, as interpreted by the Eleventh Circuit. He has been deprived of any ruling on the merits of a timely filed first petition. To the extent AEDPA means what the Eleventh Circuit says it does, the law violates the Suspension of the Writ Clause.

"Prior to the enactment of [AEDPA], a state prisoner could file a same-claim second or successive federal habeas corpus petition (i.e., one raising a claim presented and denied in a prior habeas corpus petition)" where the "'ends of justice' would be served by addressing a claim on the merits," because a manifest injustice would result if petitioner was not permitted to relitigate a claim. Hertz & Liebman, Federal Habeas Corpus Practice and Procedure § 28.4, at 1324-25 (4th ed. 2001). "AEDPA drastically revised prior law" by imposing a "blanket ban on successive litigation, codified in 28 U.S.C. § 2244(b)(1): 'A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.'" Id. Although, the Supreme Court upheld AEDPA's restrictions on new-claim successive petitions (§ 2244(b)**(2)**), "the constitutionality of AEDPA's blanket ban on same-claim petitions [(§ 2244(b)**(1)**] is less certain." Id. (emphasis added). The reasons given by the Court for upholding § 2244(b)**(2)** simply do not apply to the blanket ban of § 2244(b)**(1)**.

Felker v. Turpin, 518 U.S. 651 (1996), upheld the new-claim successive petition restrictions imposed by 28 U.S.C. § 2244(b)(2), which limited new-claim successive petitions to those involving enumerated exceptional circumstances. Hertz & Liebman, Federal Habeas Corpus Practice and Procedure § 28.4(a), at 1326. Although AEDPA "'further restricted the availability of' such petitions, the Court ruled, it did so via provisions that were 'well within the compass' of 'the complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions.'" Hertz & Liebman, supra § 28.4(a), at 1326, quoting Felker, 518 U.S. at 664.

Subsection (2) must be contrasted with the blanket prohibition of same-claim successive petitions – an absolute res judicata bar – imposed by § 2244(b)(1). "Because (1) section 2244(b)(1) does not simply 'further[] restrict' new-claim successive petitions, but, instead, forbids them under all circumstances, (2) because doing so works a literal suspension of the writ for such cases, and (3) doing so moves qualitatively beyond 'the compass' of preexisting 'equitable principles ...[,] historical usage, statutory developments, and judicial decisions,' the same-claim provision poses a serious constitutional issue that Felker did not resolve." Id. The Hertz & Liebman treatise's caution is enhanced by this Court's reluctance to apply strict rules of res judicata in habeas corpus cases:

> [T]he Court has adhered to the principle that habeas corpus is, at its core, an equitable remedy. This Court has consistently relied on the equitable nature of habeas corpus to preclude strict rules of res judicata. Thus, for example, in Sanders v. United States, 373 U.S. 1 (1963), this Court held that a habeas court must adjudicate even a successive habeas claim when required to do so by the "ends of justice." Id., at 15-17. The Sanders Court applied this equitable principle even to petitions brought under 28 U.S.C. § 2255, though the language of § 2255 contained no reference to an "ends of justice" inquiry. 373 U.S. at 12-15.

Schlup v. Delo, 513 U.S. 298 (1995) (alternate citations omitted).

The Eleventh Circuit's bright line rule prohibiting any Rule 60(b)(6) jurisdiction below by

inferring as applicable § 2244(b)(1)'s blanket prohibition of same-claim habeas petitions, suspends the Writ in violation of the Constitution. Such a result is constitutionally unacceptable. As this Court demonstrated in Slack, Felker, and Martinez-Villareal, the proper course is to interpret AEDPA to avoid the unconstitutional result, incorporating instead "earlier habeas principles" that allow the law and Constitution to coexist. If that approach cannot be applied, the Court should hold that § 2244(b)(1) suspends the Great Writ in violation of the Constitution.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

KATHLEEN M. WILLIAMS
Federal Public Defender

By: _____

Paul M. Rashkind, Supervisory
Assistant Federal Public Defender
Counsel of Record for Petitioner

Miami, Florida
July 22 2004

P:\Gonzalez, Aurelio O. Rag\Appeal\Cert Petition\Gonzalez cert Petition Final .wpd

APPENDIX

APPENDIX

Decision of the Court of Appeals for the Eleventh Circuit,
Gonzalez v. Sec'y for Dept. of Corrections,
366 F.3d 1253 (11th Cir. 2004) (en banc) A-1

Rule 60(b) Motion to Amend or Alter Judgment, dated July 30, 2001 . . . . . A-2

Order Denying Motion to Amend and Closing Case, dated March 5, 2002 . . . . . A-3

Petition for Writ of Habeas Corpus, dated June 23, 1994 . . . . . A-4

Amended Motion for Petition of Habeas Corpus, dated November 4, 1997 . . . . . A-5

Order Granting Motion to Amend Complaint, dated October 9, 1997 . . . . . A-6

Report Re Dismissal § 2254 Petition as Time Barred, dated July 16, 1998 . . . . . A-7

Supplement to July 16, 1998 Report of Magistrate Judge, dated August 14, 1998 . A-8

Supplemental Report of Magistrate Judge, dated August 14, 1998 . . . . . A-9

Order of Dismissal of § 2254 Petition as Time Barred, dated September 9, 1998 A-10

Order Granting Motion to Proceed in Forma Pauperis on Appeal,
dated February 11, 2000 . . . . . A-11

A-1

tion. When a non-frivolous appeal involves the denial of a motion to compel arbitration, it makes little sense for the litigation to continue in the district court while the appeal is pending.

[2, 3] Accordingly, the proper course for obtaining a stay in this context follows. When a litigant files a motion to stay litigation in the district court pending an appeal from the denial of a motion to compel arbitration, the district court should stay the litigation so long as the appeal is non-frivolous. If the district court denies the motion to stay, then the appellant may file a motion to stay in this Court. If this Court determines that the appeal is non-frivolous, then this Court should stay the litigation in the district court pending the appeal of the denial of the motion to compel arbitration.

Following this process, we conclude that this appeal is not frivolous, and accordingly we grant the motion to stay proceedings in the district court pending the appeal of the denial of the motion to compel arbitration. We deny as moot the request for oral argument of the motion to stay.

Aurelio O. GONZALEZ, Petitioner-Appellant,

v.

SECRETARY FOR THE DEPARTMENT OF CORRECTIONS, James Crosby, Secretary, Respondent-Appellee.

Emil Lazo, Petitioner-Appellant,

v.

United States of America, Respondent-Appellee.

Stephen A. Mobley, Petitioner-Appellant,

v.

Derrick Schofield, Warden, Georgia Diagnostic and Classification Center, Respondent-Appellee.

Nos. 02-12054, 02-12483 and 02-14224.

United States Court of Appeals, Eleventh Circuit.

April 26, 2004.

Background: Petitioners appealed from decisions of the United States District Court for the Southern District of Florida, Nos. 97-01935-CV-UUB, 90-08108-CR-WJZ, 96-08752-CV-WJZ, Ursula Ungaro-Benages, J., and William J. Zloch, Chief Judge, which denied motions for relief from judgment denying habeas or other postconviction relief. Another petitioner appealed from order of the United States District Court for the Northern District of Georgia, No. 99-00022-CV, Robert L. Vining, Jr., J., denying similar motion. The Court of Appeals, 306 F.3d 1096, 314 F.3d 571, and 317 F.3d 1308, denied certificates of appealability (COA).

Holdings: On rehearing en banc, the Court of Appeals, Carnes, Circuit Judge, held that:

(1) petitioner who failed to make substantial showing of denial of constitutional right was not entitled to COA;

(2) other petitioners were entitled to COAs;

(3) a petitioner's motion to reopen judgment could be regarded as second or successive application;

(4) one petitioner was not entitled to relief from judgment denying habeas relief on ground that judgment invalidating his statute of limitations defense was incorrect as demonstrated by intervening Supreme Court decision; and

(5) other petitioner was not entitled to relief from judgment denying habeas relief on ground that former prosecutor gave false testimony about position of victim's family regarding sentence that petitioner should receive for victim's murder.

Two applications for a certificate of appealability granted and one denied; denial of Rule 60(b) motions affirmed.

Edmondson, Chief Judge, filed opinion specially concurring in part and dissenting in part.

Tjoflat, Circuit Judge, filed opinion specially concurring in part and dissenting in part.

Barkett, Circuit Judge, filed opinion specially concurring in part and dissenting in part, in which Wilson, Circuit Judge, joined.

1. **Criminal Law ⇐1073**
   Habeas Corpus ⇐818

A certificate of appealability is required for the appeal of any denial of a motion for relief from a judgment in a habeas proceeding or a proceeding on a motion to vacate, set aside or correct sentence. 28 U.S.C.A. §§ 2253(c)(1), 2254, 2255; Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

2. **Criminal Law ⇐1073**
   Habeas Corpus ⇐818

Certificate of appealability requirement for obtaining review of denial of habeas or postconviction relief is to be administered at the threshold of the appeal, and deciding whether to issue one neither requires nor permits full consideration of the factual and legal merits of the claims. 28 U.S.C.A. § 2253(c).

3. **Habeas Corpus ⇐818**

Petitioner was not entitled to certificate of appealability permitting review of denial of a motion for relief from a judgment denying habeas relief, since petitioner failed to make a substantial showing of the denial of a constitutional right; petitioner's contention that indictment charging him with conspiracy to possess with intent to distribute cocaine, and possession with intent to distribute cocaine, was defective are not debatable among reasonable jurists. 28 U.S.C.A. §§ 2253(c)(1), 2254; Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

4. **Habeas Corpus ⇐818**

Petitioner was entitled to certificate of appealability permitting review of denial of a motion for relief from a judgment denying habeas relief since his constitutional claim challenging validity of his guilty plea was debatable among jurists of reason and it was debatable among jurists of reason whether an intervening Supreme Court decision entitled him to Rule 60(b) relief from the prior judgment on statute of limitations grounds. 28 U.S.C.A. §§ 2253(c)(1), 2254; Fed.Rules Civ.Proc. Rule 60(b), 28 U.S.C.A.

5. **Habeas Corpus ⇐205**

Central purpose behind the Antiterrorism and Effective Death Penalty Act (AEDPA) was to ensure greater finality of state and federal court judgments in criminal cases, and to that end its provisions greatly restrict the filing of second or successive petitions. 28 U.S.C.A. § 2253(c).

6. **Criminal Law ⇐1068.5**
   Habeas Corpus ⇐811

With respect to motions for relief from a judgment denying habeas or other postconviction relief, habeas rules and statutory provisions governing habeas proceedings trump general civil rule provisions that are inconsistent. Fed.Rules Civ.Proc.Rules 60(b), 81(a)(2), 28 U.S.C.A.

7. **Federal Civil Procedure ⇐2**

Congress can supersede any civil rule of procedure or other rule promulgated through the rules process by actively asserting its legislative authority to enact provisions that govern procedure.

8. **Habeas Corpus ⇐802, 894.1**

Rule 60(b) relief should not be granted from a judgment denying habeas relief unless a demanding standard is met, and which of two demanding standards applies depends on whether the recall results from a motion made by the petitioner or is done on the court's own initiative; if the recall is based on a motion by the petitioner, that motion is the functional equivalent of a second or successive petition and the applicable terms of Antiterrorism and Effective Death Penalty Act (AEDPA) applies regardless of the label put on it, but if a court of appeals is considering recalling the mandate on its own motion, the literal terms of AEDPA do not apply, and the mandate cannot be recalled unless necessary to prevent a miscarriage of justice, meaning that petitioner must be factually innocent of the crime, or of the sentence. 28 U.S.C.A. §§ 2244(b), 2254, 2255; Fed. Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

9. **Habeas Corpus ⇐894.1**

In a habeas case, a petitioner's Rule 60(b) motion to reopen the judgment can be regarded as a second or successive application for purposes of Antiterrorism and Effective Death Penalty Act (AEDPA). 28 U.S.C.A. § 2244(b); Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

10. **Habeas Corpus ⇐894.1**

A habeas petitioner may not circumvent the restrictions on second or successive petitions by the simple expedient of filing an independent action aimed at the judgment denying habeas relief. 28 U.S.C.A. § 2244(b); Fed.Rules Civ.Proc. Rule 60(b), 28 U.S.C.A.

11. **Habeas Corpus ⇐802**

A habeas petitioner will be permitted to file a Rule 60 motion for relief from judgment denying habeas relief and have it treated by the district court as a motion under that rule instead of as a non-authorized application to file a second or successive petition only where the final judgment is recalled or reopened to correct clerical errors in the judgment itself or where there was fraud upon the federal court which led to the denial of the habeas petition. 28 U.S.C.A. § 2244(b); Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

12. **Habeas Corpus ⇐802, 897**

Petitioner was not entitled to relief from a judgment denying habeas relief on ground that judgment invalidating his statute of limitations defense was incorrect as demonstrated by an intervening Supreme Court decision; petitioner's motion was an attempt to relitigate a claim that had already been presented in a prior application and rejected. 28 U.S.C.A. § 2244(b)(1); Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

13. **Habeas Corpus ⇐894.1**

Petitioner was not entitled to relief from a judgment denying habeas relief on ground that former prosecutor gave false testimony about the position of victim's family regarding the sentence that petitioner should receive for victim's murder; any misrepresentations or false testimony by former prosecutor was immaterial to the death sentence the jury returned in the case, and consequently did not fall within "fraud on the court" exception to Antiterrorism and Effective Death Penalty Act's (AEDPA) bar on second and successive petitions. 28 U.S.C.A. § 2244(b); Fed. Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

14. **Sentencing and Punishment ⇐1790(2)**

A defendant has no constitutional right to have the prosecutor explain the law accurately to victim's family before prosecutor can argue to capital sentencing

jury that family supports prosecutor's decision on what sentence to seek.

Paul M. Rashkind, Asst. Fed. Public Defender, Kathleen M. Williams, Fed. Public Defender, Miami, FL, for Gonzalez.

Cassandra Kaye Dolgin, Tallahassee, FL, Paulette R. Taylor, Miami, FL, for Crosby.

Milton Hirsch and David O. Markus (Court-Appointed), Miami, FL, for Lazo.

Lynn Dena Rosenthal, Fort Lauderdale, FL, Anne R. Schultz, Dawn Bowen, Lisa T. Rubio, Miami, FL, for U.S.

Brian Steel, The Steel Law Firm, P.C., August F. Siemon, Atlanta, GA, for Mobley.

Beth Attaway Burton, State of Georgia Law Dept., Atlanta, GA, for Schofield.

Appeals from the United States District Court for the Southern District of Florida.

Appeal from the United States District Court for the Northern District of Georgia.

Before EDMONDSON, Chief Judge, and TJOFLAT, ANDERSON, BIRCH, DUBINA, BLACK, CARNES, BARKETT, HULL, MARCUS and WILSON, Circuit Judges*.

CARNES, Circuit Judge:

The Antiterrorism and Effective Death Penalty Act, Pub.L. No. 104–132, 110 Stat. 1214 (1996), clamped down on second and successive petitions filed by state prisoners seeking federal habeas corpus relief under 28 U.S.C. § 2254, and those filed by federal prisoners seeking relief under 28 U.S.C. § 2255. *See* 28 U.S.C. §§ 2244(a)-(b), 2255 ¶ 8. Naturally, habeas petitioners and § 2255 movants have sought to circumvent the AEDPA's restrictions on second round collateral attacks in federal courts. One of the most popular vehicles used in the attempted end-runs is a Fed.R.Civ.P. 60(b) motion requesting that the prior judgment denying relief be set aside.

Given the number of cases involved and the importance of the issues, we entered an order granting hearing or rehearing en banc in three cases in order to answer some common questions that have arisen about the use of Rule 60(b) motions to obtain relief from judgments that denied § 2254 relief (in two of the cases before us), or § 2255 relief (in one of the cases). *Gonzalez v. Sec'y of the Dep't of Corr.*, 326 F.3d 1175 (11th Cir.2003). Specifically, we asked each of the three would-be appellants to brief and argue, insofar as it related to his case: 1) whether the certificate of appealability requirement contained in 28 U.S.C. § 2253(c) applies to an attempted appeal of the denial of Rule 60(b) relief from a judgment denying § 2254 or § 2255 relief; 2) if so, whether a certificate of appealability should be issued in his case; 3) what standards should govern Rule 60(b) motions aimed at judgments in § 2254 or § 2255 proceedings, that is, when should they be granted; and 4) was it an abuse of discretion for the district court to deny the Rule 60(b) motion in his case?

I.

We begin with the relevant facts and procedural history of each of the three cases before us, in the sequence in which the panel decisions or orders were issued in them.

* Judge William H. Pryor Jr. became a member of the Court on February 20, 2004, which was after this case was submitted for decision, and he did not participate in the decision of it.

BEST AVAILABLE COPY

A.

A decade ago at a retrial Stephen Mobley was convicted and sentenced to death for the 1991 murder of a Domino's Pizza employee during an armed robbery. *See Mobley v. State*, 265 Ga. 292, 455 S.E.2d 61 (1996). During the sentencing phase, Mobley introduced as potential mitigating circumstance evidence that he had offered to plead guilty in exchange for any punishment other than death. In rebuttal the prosecution called Andrew Fuller, who had been the district attorney when the prosecution began but no longer was. Fuller testified to the factors which had led him to seek the death penalty. He said those factors included the actual circumstances of the crime, and Mobley's "pure unadulterated meanness" which had been aptly demonstrated by a number of his comments since he killed the victim in cold blood. *Mobley v. Head*, 306 F.3d 1096, 1097–99 (11th Cir.2001) (Tjoflat, J., dissenting). Fuller also testified that the victim's family supported his decision to seek a death sentence. *Id.* at 1098–99. The victim's family's feelings about the penalty had not carried much weight in his decision; he told the jury that "95 percent of the decision [was] made based on the evidence [he saw] that describe[d] the defendant for [him]." *Id.* at 1099.

Among the issues Mobley raised in his direct appeal was a contention that Fuller should not have been permitted to testify about the factors that influenced him to seek a death sentence in the case. *Mobley*, 265 Ga. at 298–99, 455 S.E.2d at 69–70. The Georgia Supreme Court rejected that contention, after concluding that Fuller's testimony about why he had turned down Mobley's plea offer was relevant since Mobley had put in evidence that he had made the offer. *Id.* The Court, however, had second thoughts about permitting a capital defendant to introduce evidence that he had offered to plead guilty in return for a sentence less than death.

The first thoughts of the Georgia Supreme Court on the subject had come during an earlier appeal Mobley filed following a mistrial due to error at his first trial. *Mobley v. State*, 262 Ga. 808, 426 S.E.2d 150 (1993). Mobley asked the Georgia Supreme Court, which had the case before it primarily to decide a double jeopardy issue arising from the mistrial, also to decide whether he could introduce evidence at the retrial that he had offered to plead guilty conditioned on not receiving the death penalty. *Id.* at 810–11, 426 S.E.2d at 152–53. The Court said that he could, but that if he did the State would be allowed to explain its reasons for insisting on a death sentence. *Id.* And that is how things played out at the retrial: Mobley put in evidence that he had offered to plead guilty in return for a sentence less than death; and Fuller, the former prosecutor who had rejected that offer, testified about why he had decided nothing less than death would do.

When the case returned to it on direct appeal after the retrial, the Georgia Supreme Court had an opportunity to see the problems that had sprung from the evidentiary box that its ruling in the first appeal had opened. The Court realized that permitting testimony about a defendant's plea offer and the reasons it had been rejected would likely lead to attorneys on both sides testifying and could also put highly inflammatory matters before the jury. Facing up to its mistake, the Court announced that evidence of a defendant's conditional guilty plea offer and its rejection would not thereafter be allowed in Georgia capital cases. *Mobley*, 265 Ga. at 300, 455 S.E.2d at 70 ("[W]e now hold that offers by defendants to plead guilty and testimony of prosecutors regarding their reasons for rejecting such offers are no

longer admissible."). It was too late to close that evidentiary box in Mobley's case, of course, but the Georgia Supreme Court decided that neither the testimony concerning the plea offer and its rejection nor anything else that happened at the retrial had been reversible error. It affirmed Mobley's conviction and death sentence. *Id.* at 301, 455 S.E.2d at 71.

Thereafter, Mobley sought state habeas relief which was denied, *see Turpin v. Mobley*, 269 Ga. 635, 502 S.E.2d 458 (1998), and federal habeas relief which was denied by the district court on May 26, 2000, a denial which we affirmed, *see Mobley v. Head*, 267 F.3d 1312 (11th Cir.2001), *cert. denied*, 536 U.S. 968, 122 S.Ct. 2682, 153 L.Ed.2d 853 (2002) (mem.); our mandate was issued on June 9, 2002.

On July 16, 2002, which was two-and-a-half weeks after the United States Supreme Court denied certiorari in his appeal from the denial of federal habeas relief, Mobley filed an "Extraordinary Motion for New Trial as to Sentence" in state court. That motion sought a new sentencing stage trial where Mobley could present the victim's mother to testify that the family had acquiesced in the prosecutor's decision to seek the death penalty only because they had been unaware that a sentence of life without parole was an option. The state trial court denied Mobley's motion, reasoning that even if the testimony of the victim's mother were presented to a jury, "it [could] not reasonably be concluded that the opposition of the victim's family to the death penalty ... would probably produce a different verdict." *See Mobley*, 306 F.3d at 1099. Mobley applied to the Georgia Supreme Court for a discretionary appeal of the denial of his motion, but his application was denied. *Id.* His execution was set for August 5, 2002.

On August 2, 2002, Mobley filed in the federal district court a "Motion for Stay of Execution and for Relief from Judgment Pursuant to Fed.R.Civ.P. 60(b)." The judgment he sought relief from is the one the district court had entered on May 26, 2000, denying his § 2254 habeas petition. The district court denied Mobley's Rule 60(b) motion on August 3, 2002 in an order stating that "petitioner concedes, moreover, that the respondent is correct in asserting that pursuant to the current state of the law in the Eleventh Circuit, this motion must be treated as a second or successive habeas action." The district court thought that our prior decision in *Felker v. Turpin*, 101 F.3d 657 (11th Cir. 1996), required that all Rule 60(b) motions in habeas cases be treated as second or successive petitions.

Because it treated Mobley's Rule 60(b) motion as a second or successive habeas petition, the district court was compelled to reject it. The reason is that Mobley had not obtained an order from this Court permitting the district court to consider a second or successive petition, as he was required to do by § 2244(b)(3)(A); he could not obtain one since the ground upon which relief was sought fit neither of the two circumstances that are set out in § 2244(b)(2). Mobley filed an application for a certificate of appealability so that he could appeal the denial of his Rule 60(b) motion, and the district court denied it.

On August 5, 2002, Mobley came to this Court with the following filings: an application under § 2253(c) for a certificate of appealability so that he could appeal the district court's denial of his Rule 60(b) motion; a motion to recall the mandate this Court had issued on June 9, 2002 in conjunction with our affirmance of the denial of Mobley's first habeas petition; and, a motion for a stay of execution. *Mobley*, 306 F.3d at 1099–1100. That same day, a panel of this Court entered an order staying the execution. *Mobley v. Head*, No. 02-14224 (August 5, 2002) (per Barkett and Wilson, JJ., by quorum).

On September 18, 2002, a panel of this Court, with one judge dissenting, extended the stay of execution that it had previously granted. *Mobley v. Head*, 306 F.3d 1096 (11th Cir.2002). The panel majority believed that in denying Mobley's Rule 60(b) motion the district court had correctly interpreted our prior *Felker* decision, but anticipated that the Supreme Court would soon decide in *Abdur'Rahman v. Bell*, 535 U.S. 1016, 122 S.Ct. 1606, 152 L.Ed.2d 620 (2002) (mem.) (granting certiorari on April 22, 2002), whether all Rule 60(b) motions are subject to the restrictions applicable to second or successive petitions. Wanting the benefit of the upcoming decision in *Abdur'Rahman*, the majority granted Mobley a stay without ruling on any of his other applications or motions.

Judge Tjoflat dissented from issuance of the stay of execution, and would have also denied: Mobley's application for a certificate of appealability; his motion to recall the mandate that had issued in connection with our prior decision in the case; and an application for permission to file a second or successive habeas petition, which Judge Tjoflat thought Mobley had filed in the case, see n. 19 below. *Mobley*, 306 F.3d at 1098–1107. In Judge Tjoflat's view, the district court and panel majority had misinterpreted our *Felker* decision, which he believed did not and could not have held that all Rule 60(b) motions are to be denied as second or successive petitions. *Id.* at 1102–1105. He suggested instead that, consistent with *Felker*, "a Rule 60(b) motion should only be considered a second or successive habeas corpus petition if the former seeks to assert constitutional violations and thus is the practical equivalent of the latter." *Id.* at 1104 (internal marks omitted). A claim that the State had perpetrated a fraud on the federal court in order to obtain the judgment denying the habeas petition could be raised in a Rule 60(b)(3) motion, but Mobley's claim alleged at most a fraud on the state court, not one on the federal court. *Id.* at 1105–06. Under Judge Tjoflat's view of the proper relationship of Rule 60(b) and the restrictions on second or successive petitions, Mobley's motion should have been denied by the district court, albeit for different reasons than that court gave.

After Mobley was granted a stay of execution in light of the upcoming decision in *Abdur'Rahman*, the Supreme Court quashed the writ of certiorari in that case as improvidently granted. *Abdur'Rahman v. Bell*, 537 U.S. 88, 123 S.Ct. 594, 154 L.Ed.2d 501 (2002). Thereafter, we voted to hear the Mobley case en banc. *See Gonzalez*, 326 F.3d at 1176.

B.

The second would-be appellant is Emil Lazo, who was convicted in 1991 of conspiracy to possess with intent to distribute cocaine in violation of 21 U.S.C. § 846, and possession with intent to distribute cocaine, in violation of 21 U.S.C § 841(a)(1), and was sentenced to 293 months imprisonment. He appealed, arguing only that the evidence was insufficient to support his conviction, and in 1993 we affirmed his conviction. *See Lazo v. United States*, 314 F.3d 571 (11th Cir.2002), *vacated for reh'g en banc*, 326 F.3d 1175 (11th Cir.2003). In 1996 Lazo filed a § 2255 motion to vacate his sentence based on ineffective assistance of counsel at sentencing, and in 1998 the district court denied relief. Lazo requested a certificate of appealability, but the district court denied him one. *See id.* Lazo then came to this Court with an application for a certificate of appealability, and also filed a second request for one in the district court. Both efforts were unsuccessful, and in August 1999 we dis-

missed Lazo's attempted appeal for lack of a certificate of appealability. *See id.*

In January 2002, Lazo filed a *pro se* motion in the district court styled: "Motion for Relief From Judgment in the Collateral Proceedings filed under 28 U.S.C. § 2255 Pursuant to the Federal Rules of Criminal Procedure 12(b)(2) & Federal Rules of Civil Procedure 60(b)(4) and/or (6) Under the Premise the Otherwise Final Judgment is Void." *See id.* His motion and an accompanying brief put forward the contention that the indictment on which Lazo had been tried in 1991 was insufficient to give the district court subject matter jurisdiction for a number of asserted reasons, including failure to allege interference with interstate or foreign commerce, and failure to provide him with notice of the penalty he faced. Two months after Lazo's motion was filed, the district court summarily denied it. Lazo then filed a notice of appeal. The district court granted Lazo permission to proceed in forma pauperis, but denied his motion for a certificate of appealability. *See id.* at 573.

When the case reached this Court on Lazo's notice of appeal, a panel characterized the threshold issue as whether Lazo was required to obtain a certificate of appealability before he could appeal the denial of his motion. *See id.* at 573. Inquiring into the true nature of the motion, the panel explained that a § 2255 motion and a Rule 60(b) motion have different purposes. A § 2255 motion is aimed at having a judgment of conviction and sentence set aside because of some constitutional violation, jurisdictional defect, or other ground that makes the judgment subject to collateral attack. In contrast, a Rule 60(b) motion is aimed at having a prior judgment denying § 2255 relief from a conviction and sentence set aside because of some problem with or defect in the proceeding that led to the judgment denying § 2255 relief. *Id.*

Examining the substance of what Lazo had filed in the district court, the panel concluded that it was not a true Rule 60(b) motion, but instead was "the functional equivalent of a successive § 2255 motion." *Id.* It was that, because it did not directly attack the district court's 1998 judgment denying § 2255 relief, but instead went after the 1991 judgment of conviction and sentence on a number of grounds not raised in the earlier § 2255 motion. Because Lazo's latest filing merely raised new grounds of attack on his 1991 conviction and sentence, the panel thought it "readily apparent that the motion is really a successive § 2255 motion in 60(b)'s clothing." *Id.* As a result, the panel concluded that the district court's order denying that motion was indeed "a final order in a proceeding under section 2255" within the meaning of § 2253(c)(1)(B), which requires a certificate of appealability before any appeal can be taken. *Id.* at 573–74.

The panel construed the notice of appeal Lazo had filed as an application to this Court for a certificate of appealability, and denied it because reasonable jurists would not find it debatable whether the district court had properly denied Lazo's latest motion. Given his undisputed failure to obtain the certificate required by § 2255 ¶ 8 before filing what amounted to a second or successive motion, the district court clearly had no choice but to deny that motion. *Id.* at 574–75. After denying Lazo a certificate of appealability, the panel dismissed his appeal. *Id.* at 575.

We later vacated the panel's order so that we could reconsider the case en banc. *Gonzalez*, 326 F.3d at 1176.

C.

Our final would-be appellant is Aurelio Gonzalez, who was convicted in a Florida state court for robbery with a firearm, and was sentenced to 99 years imprisonment in 1992. He did not file a direct appeal, but in November of 1996 he filed in state court a collateral motion attacking his conviction on grounds of newly discovered evidence which he claimed showed that his guilty plea was unintelligent, unknowing, and involuntary. The state trial court denied relief in December of 1996. Gonzalez appealed, but a state appellate court affirmed. *Gonzalez v. State*, 692 So.2d 900 (Fla. 3d DCA 1997) (table).

On June 17, 1997, Gonzalez filed a § 2254 petition attacking his conviction on the same grounds he had asserted in the collateral motion he had filed in state court. On September 9, 1998, the district court dismissed his habeas petition as time-barred, on the ground that it had not been filed within the one-year statute of limitations set out in § 2244(d)(1). Initially, the district court granted a certificate of appealability, but we vacated it and remanded for clarification because the certificate did not specify any issues, which was contrary to § 2253(c)(3). On remand the district court reconsidered and denied Gonzalez a certificate of appealability, and on April 6, 2000 so did a judge of this Court. That was the end of Gonzalez's appeal from the dismissal of his habeas petition.

A little over a year later, in July of 2001, Gonzalez filed a Rule 60(b) motion asking the district court to relieve him of its final judgment dismissing his federal habeas petition as time-barred. The ground he gave was the intervening Supreme Court decision in *Artuz v. Bennett*, 531 U.S. 4, 121 S.Ct. 361, 148 L.Ed.2d 213 (2000), which interpreted the "properly filed" clause of the tolling provision contained in § 2244(d)(2).[1] The district court denied Gonzalez's motion for Rule 60(b) relief on March 5, 2002, and Gonzalez filed a notice of appeal from that denial. The district court declined to grant a certificate of appealability, but a judge of this Court granted one on the issue of whether the district court's September 9, 1998 dismissal of Gonzalez's habeas petition was error.

When the appeal authorized by that certificate reached a panel of this Court for decision, it decided that the issue which had been specified in the certificate of appealability is not directly related to the order Gonzalez is seeking to appeal. *Gonzalez v. Sec'y for the Dep't of Corr.*, 317 F.3d 1308 (11th Cir.2003), *vacated for rehearing en banc*, 326 F.3d 1175 (11th Cir. 2003). Gonzalez is not seeking to appeal the 1998 judgment dismissing his habeas petition; his attempt to appeal that judgment ended unsuccessfully in the year 2000, when he was denied a certificate of appealability for that purpose. What Gonzalez is seeking to appeal now, as the panel explained, is the district court's 2002 order denying his Rule 60(b) motion for relief from the judgment that had dismissed his habeas petition in 1998. *Id.* at 1310. If a certificate of appealability is required for an appeal from the denial of Rule 60(b) relief in a habeas case, Gonzalez needs one focusing on that 2002 order and any of the issues it presents. *Id.*

The *Gonzalez* panel decided that a certificate of appealability is required before an appeal of the denial of Rule 60(b) relief from a judgment denying habeas relief is permitted. In so holding, the panel aligned this circuit with five of the six

1. 28 U.S.C. § 2244(d)(2) specifies that "The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." That subsection includes the one-year statute of limitations which had provided the basis for the dismissal of Gonzalez's habeas petition.

other circuits that have addressed the issue. *Id.* at 1310–12. The *Gonzalez* decision went beyond that in the *Lazo* case—which had involved a second or successive petition parading as a Rule 60(b) motion—and "effectively extend[ed] *Lazo*'s holding to appeals involving the denial of true Rule 60(b) motions." *Id.* at 1312. The panel characterized Gonzalez's filing as a true Rule 60(b) motion, because it does not assert a new ground for relief from his conviction and sentence or re-assert an old one; instead, the motion is aimed solely at re-opening the judgment that had been entered against Gonzalez in his prior § 2254 proceeding on statute of limitations grounds without regard to the merits of any claims. *Id.* at 1311.

As a ground for re-opening that judgment, Gonzalez's latest motion asserted that *Artuz v. Bennett*, 531 U.S. 4, 121 S.Ct. 361, 148 L.Ed.2d 213 (2000), had changed the controlling law about which time spent in state post-conviction proceedings is to be excluded from the running of the statute of limitations. The *Artuz* decision, which did change the law of this circuit on that point, *see Weekley v. Moore*, 244 F.3d 874, 876 (11th Cir.2001), had not been released until just over two years after the judgment dismissing Gonzalez's § 2255 motion as time barred had been entered, and seven months after his efforts to appeal that judgment had ended.

The panel did not imply any view about whether *Artuz* would change the statute of limitations result in the case, *Gonzalez*, 317 F.3d at 1314 n. 3, concluding instead that even if it would, that is not a valid ground for Rule 60(b) relief. One reason the *Gonzalez* panel gave is that it was bound by the rule announced in *Mobley*, which is that in the post-AEDPA era all Rule 60(b) motions are to be treated as second or successive petitions and denied on that basis unless they fit within the narrow exceptions for them set out in § 2244(b)(2). *Id.* at 1312. The other reason the panel gave is that even without the *Mobley* rule, the result would have been the same in Gonzalez's case; his motion also would have been denied under the pre-AEDPA circuit law governing when judgments denying habeas relief can be reopened based on changes in the applicable law. *See id.* at 1313. Because the *Gonzalez* panel believed that result was not debatable among jurists of reason, it denied a certificate of appealability in the case and ordered the appeal dismissed. *Id.* at 1313–14.

We later vacated the panel's order and reinstated the case for consideration en banc. *Gonzalez*, 326 F.3d at 1176.

II.

We begin our discussion of the law with this preliminary note. Throughout this opinion we do not distinguish between the three cases before us based upon whether they involve state prisoners and § 2254 law or federal prisoners and § 2255 law, because there is no material difference in the relevant statutory language, *see* § 2253(c)(1)(A) & (B), or in how the issues arising from that language should be resolved. *See Gonzalez*, 317 F.3d at 1311 n. 1; *see also Walker v. Crosby*, 341 F.3d 1240, 1245 n. 4 (11th Cir.2003); *compare* § 2244(b) *with* § 2255 ¶ 8. What we say in this opinion about certificates of appealability and Rule 60(b) motions as they relate to § 2254 proceedings applies equally to § 2255 proceedings, and vice versa. When we say "habeas petition" we mean to include "§ 2255 motion," and our use of "habeas petitioner" includes "§ 2255 movant" as well.

A.

The *Lazo* and *Gonzalez* panel decisions address the certificate of appealability requirement as it applies to two broad categories of Rule 60(b) motions. *Lazo* concerns the category most frequently seen, which is second or successive § 2255 motions or § 2254 petitions cross-dressed as Rule 60(b) motions. Despite the clothing Lazo put on it, his is not a true Rule 60(b) motion because it does not concern a defect in the earlier § 2255 proceeding which led to the judgment denying relief to Lazo. Stripped to its essence, Lazo's motion attacks the underlying judgment of conviction and sentence itself on grounds not asserted in the prior § 2255 proceeding. *Lazo*, 314 F.3d at 572–73.

The other category of Rule 60(b) motions are the true ones. An example of them is the motion filed in the *Gonzalez* case. That motion seeks to set aside the prior judgment denying habeas relief on a traditional Rule 60(b) ground for relief from a prior judgment, or at least on a ground that was sometimes used during the pre-AEDPA era. *Gonzalez*, 317 F.3d at 1310–11. The ground is an intervening change in the law applicable to the original § 2254 petition and its claims. *Id.* at 1311; *see generally Ritter v. Smith*, 811 F.2d 1398, 1401 (11th Cir.1987) (prior to enactment of the AEDPA, Rule 60(b) relief sometimes available as a result of change in the law).

The *Lazo* panel held that the § 2253(c)(1) requirement of a certificate of appealability applies to the denial of a Rule 60(b) motion, at least when the motion is the functional equivalent of a second or successive petition, *Lazo*, 314 F.3d at 573–74, which is to say when it is not a true Rule 60(b) motion. The *Gonzalez* panel took that holding one step further, concluding that a certificate of appealability is required before there can be an appeal of any Rule 60(b) motion, even a true one. *Gonzalez*, 317 F.3d at 1311–12.

B.

[1] We agree with the *Gonzalez* panel that a certificate of appealability is required for the appeal of any denial of a Rule 60(b) motion for relief from a judgment in a § 2254 or § 2255 proceeding. This position is in line with the decisions of five of the six other circuits to consider the question. *See Kellogg v. Strack*, 269 F.3d 100, 103 (2d Cir.2001); *Rutledge v. United States*, 230 F.3d 1041, 1046–47 (7th Cir. 2000); *Morris v. Horn*, 187 F.3d 333, 336 (3d Cir.1999); *Langford v. Day*, 134 F.3d 1381, 1382 (9th Cir.1998); *Zeitvogel v. Bowersox*, 103 F.3d 56, 57 (8th Cir.1996). The only court of appeals to go the other way, the Fifth Circuit, has offered no explanation for its different direction. *See Dunn v. Cockrell*, 302 F.3d 491, 492 (5th Cir.2002).

We find persuasive the explanation the Second Circuit has given for the majority position. *See Kellogg*, 269 F.3d at 103. By its plain terms, the § 2253(c)(1) certificate of appealability requirement applies to "the final order" in a § 2254 or § 2255 proceeding, and Rule 60(b) motions have been considered final orders for appellate purposes in other types of proceedings. *See id.*; *Stone v. INS*, 514 U.S. 386, 401, 115 S.Ct. 1537,1547, 131 L.Ed.2d 465 (1995) (noting that the denial of a Rule 60(b) motion is a separate final order). Because § 2253(c)(1) refers to "the final order," it could be argued that there is only one true final order in each habeas case to which the certificate of appealability requirement applies. However, in the Dictionary Act, which is codified at 1 U.S.C. § 1, Congress has made it clear that in the statutes it enacts, "unless the context indicates otherwise words importing the singular include and apply to several persons, parties, or things...." *See United States v. Fior D'Italia, Inc.*, 536 U.S. 238, 243, 122 S.Ct. 2117, 2133, 153 L.Ed.2d 280 (2002) ("under the Dictionary Act, 1 U.S.C. § 1, a statutory provision in the singular may include the plural where that would work in the context"); *Barr v. United States*, 324 U.S. 83, 91, 65 S.Ct.

522, 525–26, 89 L.Ed. 765 (1945) (citing 1 U.S.C. § 1 as authority for construing the statutory term "buying rate" to include more than one buying rate); *Dobard v. Johnson*, 749 F.2d 1503, 1509 (11th Cir. 1985) (citing 1 U.S.C. § 1 as authority for the conclusion that "the alternative forum provision of Sec. 2241(d), though phrased in the singular, would have been intended by Congress to be treated as in the plural"). Here, the context does not indicate otherwise, and paying attention to the Congressional command in 1 U.S.C. § 1 carries out the evident intent behind § 2253(c)(1). There is no reason to treat orders denying habeas relief and subsequent orders denying motions to reopen those earlier orders differently for purposes of the certificate of appealability requirement, and there is every reason to treat them the same.[2]

The certificate of appealability is a threshold or gateway requirement which serves to filter out from the appellate process cases in which the possibility of reversal is too unlikely to justify the cost to the system of a full appellate examination. *See Miller-El v. Cockrell*, 537 U.S. 322, 337, 123 S.Ct. 1029, 1040, 154 L.Ed.2d 931 (2003) (By enacting the certificate of appealability provisions in the AEDPA, "Congress confirmed the necessity and the requirement of differential treatment for those appeals deserving of attention from those that plainly do not."). There can be no question that the certificate of appealability filter applies when a prisoner is appealing the denial of relief in his collateral attack on the judgment of conviction and sentence itself. *See* 28 U.S.C. § 2253(c).

Given that, it would make no sense to remove the filter when the same prisoner is appealing the denial of Rule 60(b) relief from the judgment denying relief, which is a kind of collateral attack on the rejection of his collateral attack. The more removed an attack is from the judgment responsible for the incarceration of a prisoner, the less likely the attack is to have merit; or, at the least, the less likely it is to have merit that matters. The Second Circuit phrased the same thought this way: "[I]t would be rather anomalous for Congress to have intended to screen out unmeritorious appeals from the denials of habeas corpus petitions and yet not have wished to apply this same screen to 60(b) motions seeking to revisit those denials." *Kellogg*, 269 F.3d at 103. Congress sometimes does anomalous things, but the language it used in § 2253(c)(1) does not persuade us that it intended to act in an anomalous and inconsistent way here.

While we respect the dissent's different view on the issue of whether certificates of appealability are required, we find the reasoning behind its view unpersuasive. To begin with, the dissent's criticism of our conclusion on this issue is based at least in part on a misunderstanding of it. The dissent says in Part IV that we are holding a petitioner must apply to this Court for leave to file his Rule 60(b) motion. Dissenting Op. at 1300–1302. Not so. Rule 60(b) motions must be filed in the district court, not in this Court, and nothing we say is intended to suggest anything to the contrary. Our conclusions have to do with the proper scope of Rule 60(b) motions in habeas proceedings and with whether a certificate of appealability is required to seek review of a district court's denial of one in a habeas proceeding. We change nothing about where Rule 60(b) motions must be filed, which is in the district court. If the motion does not meet the requirements we outline today, the district court must deny it. If a petitioner wishes to appeal the denial of a Rule 60(b) motion aimed at a judgment denying habeas relief, he must obtain a certificate of appealability in order to do so.

The dissent's criticism that no Rule 60(b) motion could ever meet the standards set out for certificates of appealability in § 2253(c)(1) & (c)(2), which provides that they "may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right," is obviously unfounded. *See generally* Dissenting Op. Part IV. Our disposition of two of the cases in front of us proves how unfounded it is. We conclude in Part III of this opinion that two of the three petitioners are entitled to a certificate of appealability, and we issue each of them one. We do so applying guidance the Supreme Court provided us in *Slack v. McDaniel*, 529 U.S. 473, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000), which dealt with certificate of appealability applications to review procedurally based denials in habeas cases. That which is done is not impossible.

Furthermore, a central premise of the dissent's impossibility argument is that the decision of whether to issue a certificate of appealability must be confined to consideration of the debatability of a constitutional issue. It must be, the dissent reasons, because the certificate of appealability standard is whether "the applicant has made a substantial showing of the denial of a constitutional right." *See* § 2253(c)(2). Appealing as it might otherwise be, that reasoning is at war with the Supreme Court's holding in the *Slack* case. Construing and applying the identical statutory language, the Court in *Slack* concluded that in deciding whether to issue a certificate of appealability to permit an appeal from the denial of a habeas petition on procedural grounds, courts must consider the debatability of the procedural ruling, and no certificate may be issued if the petitioner fails to make a substantial showing that the procedural ruling was wrong. 529 U.S. at 484, 120 S.Ct. at 1604. The dissent's position that the certificate of appealability standard cannot be applied to any non-constitutional questions will be news to the Supreme Court, because it is impossible to reconcile that position with the rule the Court announced in *Slack*.

The dissent's position that a certificate of appealability is never required to appeal the denial of Rule 60(b) relief in a habeas case is also contrary to the decisions of other circuits. The dissent attempts to distinguish most of the decisions of the other circuits that have addressed the issue and have concluded that a certificate of appealability is required to appeal a Rule 60(b) denial in a habeas case. It says that in those cases the Rule 60(b) motion was not a "true" one and for that reason was correctly denied by the district court. Dissenting Op. at 1300. But that attempted distinction will not wash. There is nothing in the language or purpose of § 2253(c) that distinguishes between Rule 60(b) motions based upon whether they are "true" ones or not. And the dissent never explains why the nature of the Rule 60(b) motion should determine whether a certificate of appealability is required to appeal from the denial of it.[3] The statuto-

2. Although it agrees with us that the word "the" in the statutory term "the final order" can be read in the plural, the dissent (we will use "the dissent" throughout this opinion to refer to Judge Tjoflat's separate opinion specially concurring in part and dissenting in part) thinks it should not be read that way unless doing so would carry out the legislative intent behind the certificate of appealability requirement in § 2253(c)(1). Dissenting Op. at 1298–1299. We agree with that. Our disagreement with the dissent stems from our recognition that the evident legislative intent behind requiring such certificates in habeas cases was to filter out undeserving appeals with a minimum of judicial effort, and that intent would be frustrated unless "the final order" is interpreted to include final orders denying Rule 60(b) relief in habeas cases.

3. Going back to the singular versus plural question relating to § 2253(c)'s use of the

ry language covers, and the certificate requirement applies, to all of them or to none. And the clear weight of authority, with which we agree, is that it applies to all of them.

Although the dissent attempts to distinguish much of the precedent against its position with the suggestion that the certificate of appealability requirement applies to the appeals of some but not all Rule 60(b) denials in habeas cases, the dissent's core position seems to be that the certificate of appealability requirement applies to no Rule 60(b) appeals at all.[4] For reasons that should be apparent, that position would reverse the rational order of things. As we have already explained, not applying the certificate requirement to a Rule 60(b) denial would make it easier to appeal the rejection of a collateral attack on the denial of habeas relief than it is to appeal the initial denial of habeas relief itself. It would defeat Congress' obvious intent that the certificate of appealability requirement be an important and effective tool to weed out unmeritorious appeals and bring about greater finality of judgment in habeas cases.

The dissent fails to face up to those inescapable and undesirable results of its position. It does not even attempt to explain why Congress would have wanted to cut out clearly non-meritorious appeals from the denial of habeas relief, while at the same time letting all clearly non-meritorious appeals from the subsequent denial of Rule 60(b) in habeas cases proceed to burden the appellate courts and undermine finality of judgment.

The burden would be significant. Under our position a single judge decides whether the appeal from a denial of Rule 60(b) relief has enough arguable merit to proceed—whether the issues it seeks to raise are debatable among jurists of reason. Under the dissent's position, a full-blown appeal with regular briefing and a decision on the merits by a three-judge panel would have to occur every time there is a Rule 60(b) denial in a habeas case and the petitioner elects to appeal. And prisoners will almost always elect to appeal given all the free time on their hands. *See Harris v. Garner*, 216 F.3d 970, 978–79 (11th Cir.2000) (en banc). The dissent would have the courts of appeal entertain and decide each of those appeals no matter how clearly non-meritorious it appeared from the outset, and no matter whether it was from the denial of the first or fifth or fifteenth Rule 60(b) motion the petitioner had filed. Congress could not have intended that.

For all of these reasons, we conclude that the certificate of appealability requirement applies not only to all final judgments denying § 2254 or § 2255 relief, but also to all final judgments denying Rule 60(b) relief from those earlier final judgments.[5]

term "the final order," the dissent's attempt to explain away the other circuits' authority massed against its position would mean that where the Rule 60(b) motion that is denied is a true one, "the final order" was used by Congress in the singular sense, where the motion denied is not a true one, it was used by Congress in the plural sense. See Dissenting Op. at 1299–1300. That bipolar construction does not make sense.

4. We qualify our description of the dissent's position with "seems to be," because there is some inconsistency about this subject in its opinion. Part III.A of the dissenting opinion clearly asserts the position that the § 2253(c) requirement does not apply to appeals from the denial of any Rule 60(b) motions, because it pertains only to the first order denying habeas relief. Dissenting Op. at 1300. Yet, in the very next part of the same opinion, the dissent attempts to reconcile its position with this Court's decision in *Lindsey* (requiring a certificate before an appeal from the denial of a Rule 60(b) motion in that habeas case) by at least implying that a certificate is required if the Rule 60(b) motion is not a true one. *See* Dissenting Op. Part III.B at page 1300.

III.

The next question up is whether certificates of appealability should be issued in the three cases before us. Congress has provided that a certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The Supreme Court has explained that this means the petitioner must show "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 1603–04, 146 L.Ed.2d 542 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n. 4, 103 S.Ct. 3383, 3394 n. 4, 77 L.Ed.2d 1090 (1983)); *accord Miller–El v. Cockrell*, 537 U.S. 322, 335–36, 123 S.Ct. 1029, 1039, 154 L.Ed.2d 931 (2003).

[2] The certificate of appealability requirement is to be administered at the threshold of the appeal, and deciding whether to issue one neither requires nor permits full consideration of the factual and legal merits of the claims, *Miller–El* at 336, 123 S.Ct. at 1039, because "[t]he question is the debatability of the underlying constitutional claim, not the resolution of that debate," *id.* at 342, 123 S.Ct. at 1042. That means a petitioner is not required to demonstrate entitlement to appellate relief in order to be given an opportunity to pursue it. Still, the certificate of appealability requirement is not a toothless one, and it should be applied with its purpose in mind, which is to separate out those appeals that deserve more careful attention from the ones that do not. More than the absence of frivolity or the presence of good faith is required for a petitioner to clear this hurdle. *Id.* at 335–38, 123 S.Ct. at 1039–40.

Of particular relevance to the three cases we have before us, each of which involves Rule 60(b) procedural issues in addition to merits issues, is the *Slack* decision. In that case the district court had denied the habeas petition on procedural grounds without reaching the underlying constitutional claim. *Slack*, 529 U.S. at 484, 120 S.Ct. at 1604. The Supreme Court held that in those circumstances a certificate of appealability should issue only if the petitioner makes both a substantial showing that he had a valid claim of the denial of a constitutional right, and a substantial showing that the procedural ruling is wrong. *Id.* at 484, 120 S.Ct. at 1604. Those are the two components of the showing a petitioner in that situation must make in order to be entitled to a certificate of appealability. If either of the components is lacking, a court may deny the application for a certificate because of the absence of that component without deciding whether the other one exists. *Id.* at 485, 120 S.Ct. at 1604 ("Each component of the § 2253(c) showing is part of a threshold inquiry, and a court may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments.").

A.

[3] With these principles in mind we turn to the specific cases. The easiest case in which to decide the certificate of

5. In Part IV of its opinion the dissent recasts our conclusions and the rules we announce. We reject that recasting, and we remind the reader that in any decision of this Court the law of the circuit is contained in the majority opinion, not in the dissenting opinion's description of it.

appealability question is *Lazo*. The underlying constitutional claim in that case asserts that the indictment charging Lazo with conspiracy to possess with intent to distribute cocaine, and possession with intent to distribute cocaine, was insufficient to give the district court subject matter jurisdiction because of its failure to allege an effect on interstate or foreign commerce, and its failure to provide Lazo with specific notice of the penalty he faced. There is no basis at all for those claims. An examination of the indictment, which is in the record before us, reveals that it is fully adequate in all respects. Lazo's contentions that the indictment is defective are not debatable among reasonable jurists. Because he has failed to make a substantial showing of the denial of a constitutional right, we deny him a certificate of appealability on that basis. We do so without reaching the procedural component of the required showing, which is whether any of the Rule 60(b) motion issues that his case gives rise to are debatable among jurists of reason.

B.

[4] Gonzalez's claim is a different matter. He contends that his guilty plea was unintelligent, unknowing, and involuntary based upon specific evidence he has proffered. From the record before us, which does not contain a transcript of the guilty plea proceeding (there is some indication no transcript exists), we cannot say that Gonzalez's claim is not debatable among jurists of reason. Therefore, his appeal cannot be dispensed with at the certificate of appealability stage on the basis of the constitutional claim component.

As for the procedural component, Gonzalez must show that it is debatable among jurists of reason whether the intervening decision in *Artuz v. Bennett*, 531 U.S. 4, 121 S.Ct. 361, 148 L.Ed.2d 213 (2000), entitles him to Rule 60(b) relief from the prior judgment denying habeas relief on statute of limitations grounds. Rule 60(b) relief may not be available in these circumstances, but before we decide (a little later in this opinion) what standards apply in the post-AEDPA era to Rule 60(b) motions in habeas cases, we cannot say Gonzalez's position on that procedural issue is not debatable among jurists of reason. Accordingly, we will grant Gonzalez a certificate of appealability and proceed to a full consideration of his appeal.

In keeping with the dictates of § 2253(c)(3), we specify the issues on which the certificate is granted as being the last two for which we requested en banc briefing in this case: What standards are applicable to Rule 60(b) motions in § 2254 cases, and in light of those standards was it an abuse of discretion for the district court to deny the motion?

C.

As in Gonzalez's case, so also in Mobley's case. His constitutional claim may lack merit, but we cannot say based upon the record before us that it is not debatable among jurists of reason. The same is true of the procedural issues arising from his case. Until we decide what standards apply to Rule 60(b) motions in habeas cases, Mobley's position that he is entitled to relief from the judgment denying him habeas relief is debatable among jurists of reason. So he, too, gets a certificate of appealability, and it is one specifying the same two issues we specified for Gonzalez.

IV.

Having decided that the § 2253(c) certificate of appealability requirement does apply to appeals from denials of Rule 60(b) relief in habeas cases, and that a certificate of appealability ought to be issued in the *Gonzalez* and *Mobley* cases, we turn now to the third issue for which we granted en

banc review.[6] What standards govern Rule 60(b) motions aimed at judgments in habeas proceedings, that is, when should those motions be granted?

A.

This question is critically important because of the consistent direction and the substantial extent to which limitations on second or successive petitions have evolved. The evolution has been toward greater finality of judgments through increasingly tight restrictions on second or successive petitions. We have gone from the days of the more permissive ends of justice and abuse of the writ standards, *see, e.g., Sanders v. United States*, 373 U.S. 1, 12, 83 S.Ct. 1068, 1075, 10 L.Ed.2d 148 (1963); to the post-*McCleskey* era with its less permissive cause and prejudice standard, *see, e.g., McCleskey v. Zant*, 499 U.S. 467, 493, 111 S.Ct. 1454, 1470, 113 L.Ed.2d 517 (1991); *Sawyer v. Whitley*, 505 U.S. 333, 338, 112 S.Ct. 2514, 2518, 120 L.Ed.2d 269 (1992); to the present post-AEDPA times, with a total ban on claims that were presented in a prior petition, § 2244(b)(1), and a near-total ban on those that were not, *see* § 2244(b)(2).

[5] The central purpose behind the AEDPA was to ensure greater finality of state and federal court judgments in criminal cases, and to that end its provisions greatly restrict the filing of second or successive petitions. The Supreme Court and this Court have made these points many times before. *See Miller-El v. Cockrell*, 537 U.S. 322, 337, 123 S.Ct. 1029, 1039–40, 154 L.Ed.2d 931 (2003) ("Statutes such as AEDPA have placed more, rather than fewer, restrictions on the power of federal courts to grant writs of habeas corpus to state prisoners."); *Tyler v. Cain*, 533 U.S. 656, 661, 121 S.Ct. 2478, 2481–82, 150 L.Ed.2d 632 (2001) ("AEDPA greatly restricts the power of federal courts to award relief to state prisoners who file second or successive habeas corpus applications."); *Williams v. Taylor*, 529 U.S. 420, 436, 120 S.Ct. 1479, 1490, 146 L.Ed.2d 435 (2000) ("AEDPA's purpose [is] to further the principles of comity, finality, and federalism"); *Calderon v. Thompson*, 523 U.S. 538, 558, 118 S.Ct. 1489, 1502, 140 L.Ed.2d 728 (1998) ("AEDPA's central concern [is] that the merits of concluded criminal proceedings not be revisited in the absence of a strong showing of actual innocence."); *Johnson v. United States*, 340 F.3d 1219, 1224 (11th Cir.2003) ("It is generally accepted that one of the principal functions of AEDPA was to ensure a greater degree of finality for convictions."); *Jones v. United States*, 304 F.3d 1035, 1039 (11th Cir.2002) ("A fundamental purpose for the AEDPA was to establish finality in post-conviction proceedings.").

[6] That central purpose of the AEDPA and its provisions specifically restricting the filing of second or successive petitions severely limit the application of Rule 60(b) to habeas cases. Rule 11 of the Rules Governing § 2254 Cases provides that the Federal Rules of Civil Procedure "may be applied, when appropriate" in habeas proceedings, but only "to the extent that they are not inconsistent with these

6. We offer this explanation about the way we are proceeding. We realize, of course, that our procedure for dealing with the cases we have before us does not follow the usual course in these matters. Ordinarily, whether to grant a certificate of appealability in a case is decided first, and if a certificate is granted full briefing on the issues specified in the certificate follows. In this en banc case, we have collapsed the briefing on the certificate of appealability issues with that about the proper scope of Rule 60(b) motions in § 2254 and § 2255 cases, because we determined that this is the most efficient way to decide all of the issues. The parties were given ample opportunity to fully brief and to argue all of the issues we decide here.

rules." Rule 11, 28 U.S.C. fol. § 2254. Given that the habeas rules trump the civil ones to the extent of any inconsistency, it certainly follows that statutory provisions governing habeas proceedings also trump general civil rule provisions that are inconsistent, and that is especially true of subsequently enacted statutory provisions such as those in the AEDPA. The civil rules themselves explicitly recognize as much by providing that they are applicable to habeas corpus proceedings only "to the extent that the practice in such proceedings is not set forth in statutes of the United States" or in the habeas rules. Fed.R.Civ.P. 81(a)(2).[7]

[7] There's a different way of explaining the same point. Congress allowed Rule 60(b) to be created through the Rules Enabling Act process, *see generally*, 28 U.S.C. §§ 2071–2077, by not exercising its legislative authority to veto or modify that rule, *see* § 2074. Congress can supercede Rule 60(b) or any other rule promulgated through the rules process by actively asserting its legislative authority to enact provisions that govern procedure. The AEDPA with its restrictions on the filing of second or successive petitions, *see* 28 U.S.C. § 2244(b), is an example of Congress doing that to some extent.

[8] Regardless of how one explains it, if the earlier adopted rule is inconsistent with the later enacted statutory provision, the rule yields to the statute to the extent of the inconsistency. And unless its operation is throttled back in habeas cases, Rule 60(b) is inconsistent with § 2244(b). Applying Rule 60(b) full throttle to final judgments in habeas cases would essentially repeal the later-enacted AEDPA provisions restricting second or successive petitions. The rule's provisions are broadly worded and permit judgments to be reopened "upon such terms as are just" for any number of reasons, including to correct a mistake, to undo the result of inadvertence, or to remedy excusable neglect, Fed.R.Civ.P. 60(b)(1); or because of newly discovered evidence, Fed.R.Civ.P. 60(b)(2); or for "any other reason justifying relief from the operation of the judgment," Fed.R.Civ.P. 60(b)(6).[8] The latitude that the rule gives courts to reopen final judgments is frequently described as a "broad discretion." *See, e.g., Bennett v. Dr. Pepper/Sev-*

7. The habeas rules, too, will soon explicitly recognize the obvious point that the civil rules do not apply to habeas proceedings to the extent that they are inconsistent with any statutory provision. The Judicial Conference has approved and recommended to the Supreme Court a revision of the habeas rules, which includes the following restyled Rule 12: "The Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, *to the extent that they are not inconsistent with any statutory provision* or these rules, may be applied to a proceeding under these rules." *Proposed Amendments to Proceedings under 28 U.S.C. § 2255* (emphasis added). The accompanying committee note states that the change is intended to be stylistic only and that no substantive change is being made. *Id.*

8. Rule 60(b) provides that the court may relieve a party from a final judgment, order or proceeding

for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud ... misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

The motion must be made "within a reasonable time ... and for reasons (1), (2), and (3), not more than one year after the judgment, order, or proceeding was entered or taken." Fed.R.Civ.P. 60(b).

en Up, Inc., 296 F.3d 806, 807 (8th Cir. 2002) ("We will reverse a district court's ruling on a Rule 60(b) motion only if there was a clear abuse of the court's broad discretion."); *Marquip, Inc. v. Fosber America, Inc.*, 198 F.3d 1363, 1369 (Fed. Cir.1999) ("[T]his court detects no abuse of the district court's broad discretion to apply Rule 60(b)."); *Hoult v. Hoult*, 57 F.3d 1, 3 (1st Cir.1995) ("We note at the outset that district courts enjoy broad discretion in deciding motions brought under Rule 60(b)."); *Lee v. Village of River Forest*, 936 F.2d 976, 979 (7th Cir.1991) ("A trial judge has broad discretion to grant Rule 60(b) relief from judgment.").

Most of the provisions of Rule 60(b), which vest courts with broad discretion to reopen judgments on a wide variety of grounds, are inconsistent and irreconcilable with the AEDPA's purpose, which is to "greatly restrict[ ] the power of federal courts to award relief to state prisoners who file second or successive habeas corpus applications," *Tyler v. Cain*, 533 U.S. at 661, 121 S.Ct. at 2481–82, and with its "central concern that the merits of concluded criminal proceedings not be revisited in the absence of a strong showing of actual innocence," *Calderon*, 523 U.S. at 558, 118 S.Ct. at 1502. Consider, for example, Rule 60(b)(2), which permits the reopening of a final judgment based upon newly discovered evidence. If that rule were applied in habeas cases it would effectively erase from the books the more recent and more specific statutory requirement that final judgments denying habeas relief not be reopened or set aside because of newly discovered evidence, unless "the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense," § 2244(b)(2)(B)(ii). And Rule 60(b)(1), which permits a court to reopen a final judgment to undo a litigation loss that resulted from "mistake, inadvertence, surprise, or excusable neglect," would have the same vitiating effect.

No part of the rule, if it were applied to habeas cases, could do more harm to the finality of judgments and the interests protected by the AEDPA than Rule 60(b)(6) which permits reopening a final judgment for "any other reason justifying relief from the operation of the judgment." As Judge Tjoflat has explained, limiting the operation of Rule 60(b)(6) in habeas cases is critically important, because "[a] district court that uses this 'catch-all' provision to allow a habeas corpus petitioner to obtain review of a new constitutional claim will ... eviscerate the provisions of AEDPA." *Mobley*, 306 F.3d at 1101 n. 3 (Tjoflat, J., dissenting).

The discretion to reopen final judgments contemplated in most of the provisions of Rule 60(b) cannot co-exist in a habeas case with § 2244(b). That statutory provision, whose second or successive petition restrictions are "grounded in respect for the finality of criminal judgments," *Calderon*, 523 U.S. at 558, 118 S.Ct. at 1502, explicitly forbids setting aside final judgments denying habeas relief except in rare circumstances that fit within the two narrow exceptions contained in that statutory provision. The severe restrictions on revisiting final judgments that are contained in § 2244(b) are virtually the antithesis of the broad discretion that Rule 60(b) generally gives district courts to reopen them.

We reject, because Congress in enacting the AEDPA has rejected, any notion that habeas proceedings are just another category of civil cases for purposes of Rule 60(b). Or, to put it in terms of the Federal Rules of Civil Procedure themselves, we conclude that insofar as reopening final judgments in habeas cases is concerned, "the practice in such proceedings is [ ] set forth in statutes of the United States," *see*

Fed.R.Civ.P. 81(a)(2), and specifically in § 2244(b).

That means Rule 60(b) cannot and does not apply in habeas cases the way it does in ordinary civil cases, but it does not necessarily mean that no aspect of the rule has any relevance to habeas cases. It may have some limited role to play in habeas cases; that is, there may be some aspect of Rule 60(b) that is not inconsistent with the AEDPA. For guidance about what limited role Rule 60(b) might play in habeas cases we look to the Supreme Court's *Calderon* decision, which involves the closest analogy (the recall of appellate mandates in habeas cases) we can find and provides some compelling reasoning.

B.

The *Calderon* case had a lengthy procedural history, but the relevant part of it for our purposes began after a panel of the Ninth Circuit reversed a district court's grant of habeas relief as to the rape-murder conviction and death sentence of the petitioner, Thomas Thompson. The district court had granted that relief after concluding that Thompson had suffered from ineffective assistance of counsel, but the panel disagreed. *See Calderon*, 523 U.S. at 544–46, 118 S.Ct. at 1495–96. After rehearing en banc was denied, the appellate mandate directing the district court to deny all relief was issued. *Id.* at 546, 118 S.Ct. at 1496.

Thompson then brought forward new evidence that there had been no rape; he had found a witness who would testify to having seen the victim engaged in what appeared to be consensual sex with Thompson on the night she was murdered. Thompson filed in the court of appeals a motion to recall the mandate, and the next day he filed in the district court a Rule 60(b) motion to set aside the judgment denying him habeas relief that had been entered in obedience to the appellate court's mandate. Both motions were based on the new evidence that there had been no rape because the sex had been consensual. *Id.*

In denying Thompson's Rule 60(b) motion, the district court construed it to be a successive petition under § 2244, and explained that "Thompson 'must not be permitted to utilize a Rule 60(b) motion to make an end-run around the [statutory] requirements' " of the AEDPA governing second or successive petitions. *Id.* at 547, 118 S.Ct. at 1496. Even with his new witness, in view of the other evidence against him, Thompson could not show that he was actually innocent so that his execution would be a miscarriage of justice. *Id.* at 547, 118 S.Ct. at 1496–97.

The Ninth Circuit panel denied Thompson's motion to recall the appellate mandate, but two days before he was scheduled to be executed the en banc court voted to recall the mandate, which had been issued 53 days earlier. *Id.* at 547–48, 118 S.Ct. at 1497. The en banc court did so not on the basis of the new evidence asserted in Thompson's motion to recall, but instead acted sua sponte based solely on the claims and evidence that had been presented in his first habeas petition, the one that had led the district court to grant relief originally only to be reversed by the panel. The en banc court gave two reasons for recalling the mandate.

One reason was that rehearing en banc would have been granted before the mandate issued but for procedural misunderstandings and mistakes within the court itself. The other reason was that the panel's decision reversing the grant of habeas relief "would lead to a miscarriage of justice." *Id.* at 548, 118 S.Ct. at 1497. The miscarriage of justice the en banc court perceived was that the panel decision was wrong. It held that Thompson had been denied effective assistance of counsel and

directed the district court to issue the writ on that ground. In doing so, the en banc court made no effort to determine if Thompson was actually innocent of the crime. *Id.* at 548–49, 118 S.Ct. at 1497.

The Supreme Court reversed the en banc Ninth Circuit's decision. In doing so, the Court acknowledged that generally the power of a court of appeals to recall its mandate is inherent and unquestioned. *Id.* at 549–50, 118 S.Ct. at 1498. Habeas cases, however, are different, and that difference matters when it comes to reopening final judgments. The *Calderon* opinion explains that because of "the profound societal costs that attend the exercise of habeas jurisdiction," the Court had "found it necessary to impose significant limits on the discretion of federal courts to grant habeas relief." *Id.* at 554–55, 118 S.Ct. at 1500. Among the examples given in the opinion are the limitations the Court had imposed on the ability of lower courts to consider second petitions, to consider procedurally defaulted claims, and to consider claims that are based upon new decisional law. *Id.*

Underlying those limitations imposed by its decisions is what the Supreme Court characterized as "our enduring respect for the State's interest in the finality of convictions that have survived direct review within the state court system." *Id.* at 555, 118 S.Ct. at 1500 (citations and marks omitted). Finality of judgment is of critical importance to our criminal justice system, the Court explained, because finality is "essential to both the retributive and the deterrent functions of criminal law," it "enhances the quality of judging," and it "serves as well to preserve the federal balance." *Id.* at 555, 118 S.Ct. at 1501.

The interest in finality of judgment, which is of considerable importance when state review of a conviction and sentence has been completed, becomes truly compelling, in the Supreme Court's view, after a federal court of appeals has issued a mandate denying habeas relief. At that point, the State is entitled not simply to an assurance of finality but, to use terms from the *Calderon* opinion, to "real finality" or "actual finality." *Id.* at 556–57, 118 S.Ct. at 1501–02. Because mandate recalls threaten that entitlement and the critical interests that underlie it, their field of permissible use is severely restricted in habeas cases.

Or, as the Supreme Court said, when judging the propriety of any exercise of the power to recall a mandate, "we measure it not only against standards of general application, but also against the statutory and jurisprudential limits applicable in habeas corpus cases." *Id.* at 553, 118 S.Ct. at 1499. Of course, the most relevant statutory limits are those in § 2244(b) which stringently restrict consideration of second or successive petitions. Because what the Court said about the application of those provisions to mandate recall motions bears so directly on Rule 60(b) motions in habeas cases, it is worth a block quote:

> In a § 2254 case, a prisoner's motion to recall the mandate on the basis of the merits of the underlying decision can be regarded as a second or successive application for purposes of § 2244(b). Otherwise, petitioners could evade the bar against relitigation of claims presented in a prior application, § 2244(b)(1), or the bar against litigation of claims not presented in a prior application, § 2244(b)(2). If the court grants such a motion, its action is subject to AEDPA irrespective of whether the motion is based on old claims (in which case § 2244(b)(1) would apply) or new ones (in which case § 2244(b)(2) would apply).

Id. at 553, 118 S.Ct. at 1500. That would have been the end of the case, if the mandate recall in *Calderon* had come as a

result of the petitioner's motion. *See id.* at 562, 118 S.Ct. at 1504 ("Had [the en banc court] considered the additional evidence or claims presented in Thompson's motion to recall the mandate, of course, its decision would have been subject to § 2244(b).").

More analysis was required in that case, however, because of a procedural wrinkle: The en banc Ninth Circuit had insisted that it did not recall the mandate based upon anything contained in Thompson's motion, but instead coincidentally recalled its mandate sua sponte based solely upon the claims contained in the original habeas petition and the evidence that had been presented in support of that petition. *Id.* at 548, 554, 118 S.Ct. at 1497, 1500. This procedural wrinkle potentially mattered because the text of § 2244(b) covers only court action pursuant to a petitioner's application. *See id.* at 554, 118 S.Ct. at 1500; *see also* § 2244(b)(1) ("A claim presented in a second or successive habeas corpus application ...."); § 2244(b)(2) ("A claim presented in a second or successive habeas corpus application....").

Because the recall of the mandate had not been based upon Thompson's motion and the en banc court had not considered anything contained in that motion in making its decision, the Supreme Court acknowledged that the terms of § 2244(b) did not govern the peculiar circumstances of that specific mandate recall. *Id.* at 554, 118 S.Ct. at 1500. It made little difference that § 2244(b) technically did not apply, however, because the Supreme Court held that even where a post-judgment situation does not fit within the actual terms of the AEDPA, a court "must exercise its discretion in a manner consistent with the objects of the statute," and "the court must be guided by the general principles underlying our habeas corpus jurisprudence." *Id.* Guided by those principles and with an eye on the objects of the AEDPA, the Court concluded that even though sua sponte mandate recalls are not within the literal terms of the statute, none should be granted unless necessary to prevent a miscarriage of justice, as that term is defined in the pre-AEDPA habeas corpus jurisprudence. *Id.* at 557–58, 118 S.Ct. at 1502.[9]

The miscarriage of justice standard is appropriate in that situation, the Court reasoned, because it "comports with the values and purposes underlying AEDPA," even though the AEDPA provisions did not literally apply in that case because the en banc court action had not been based upon the petitioner's motion. *Id.* at 558, 118 S.Ct. at 1502. The miscarriage of justice standard was recognized by the Court to be "altogether consistent ... with AEDPA's central concern that the merits of concluded criminal proceedings not be revisited in the absence of a strong showing of actual innocence." *Id.* Actual factual innocence is required; legal innocence is not enough. It is a narrow and well-defined exception that will rarely be found to exist. *Id.* at 559, 118 S.Ct. at 1502–03.

9. The Supreme Court drew the actual innocence standard it announced for sua sponte mandate recalls from its decision in *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995), instead of using the one contained in § 2244(b)(2)(B). *See Calderon*, 523 U.S. at 559–60, 118 S.Ct. at 1502–03. There are some differences between the two standards. For example, under the *Schlup* formulation when the constitutionality of the conviction is at issue because of new evidence, the standard is whether "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Schlup*, 513 U.S. at 327, 115 S.Ct. at 867, *quoted in Calderon*, 523 U.S. at 559, 118 S.Ct. at 1503. By contrast, under § 2244(b)(2)(B) the standard is whether it has been established "by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the petitioner guilty of the underlying offense."

C.

The lessons about reopening a final habeas judgment that we draw from the *Calderon* decision and opinion are that Rule 60(b) relief should not be granted from a judgment denying habeas relief unless a demanding standard is met, and which of two demanding standards applies depends on whether the recall results from a motion made by the petitioner or is done on the court's own initiative. If the recall is based on a motion by the petitioner, that motion is the functional equivalent of a second or successive petition and the terms of the AEDPA's § 2244(b) apply regardless of the label put on it. If, on the other hand, a court of appeals is considering recalling the mandate on its own motion the literal terms of § 2244(b) do not apply, but the mandate cannot be recalled unless necessary to prevent a miscarriage of justice; that means the petitioner must be factually innocent of the crime, or of the sentence, as defined in the pre-AEDPA federal habeas jurisprudence, see n. 9, above.

The Supreme Court in *Calderon* indicated that only two exceptions apply to the rule that the final judgment in a habeas case may not be reopened by a recall of the mandate unless the demanding standard that applies is met. One exception is that the mandate may be recalled to correct a mere clerical error in the judgment. *Id.* at 557, 118 S.Ct. at 1501. The other exception is that the mandate may be recalled where there was "fraud upon the court, calling into question the very legitimacy of the judgment." *See id.* at 557, 118 S.Ct. at 1501–02. Neither situation was present in the *Calderon* case, nor did the petitioner meet the demanding standard (actual innocence) that applied there. As a result, the judgment of the Ninth Circuit en banc court recalling the mandate and affirming the grant of federal habeas relief to Thompson was reversed. *Id.* at 566, 118 S.Ct. at 1506.

D.

Calderon's lessons about whether and when an appellate court's power to recall a mandate may be used in habeas cases apply with as much force to the question of whether and when a trial court's Rule 60(b) authority to reopen a final judgment may be used in a habeas case. Recalling the mandate to reopen and alter the final judgment in a habeas case is the closest thing on the appellate level to the use of Rule 60(b) to reopen and change a final judgment at the trial level. The unfettered application of either procedure to reopen final judgments in habeas cases would undermine important principles and values protected by the restrictions contained in habeas decisional law and the AEDPA.

The Supreme Court emphasized in *Calderon* "our enduring respect" for a state's interest in the finality of a judgment that has survived review within the state system, and it stressed that finality of judgments is essential to the proper functioning of the criminal justice system and to preservation of the federal balance. *Calderon*, 523 U.S. at 555–56, 118 S.Ct. at 1500–01. Our enduring respect for the interests behind finality of criminal judgments, and our understanding that finality is essential to criminal justice and to our federal system, does not vary depending on whether the threat to finality comes from a motion to recall the mandate or from a Rule 60(b) motion. When a federal appellate court has issued a mandate denying habeas relief, the state's interests in finality of a judgment of its courts are no less "compelling," *id.* at 556, 118 S.Ct. at 1501, and its entitlement to "real finality" and "actual finality" is not diminished simply because the petitioner's attempt to reopen the judgment is wrapped in Rule

60(b) packaging instead of mandate recall paper. The interests threatened and the importance of those interests are the same regardless of whether the attack comes at the district court or appellate level. A reopened judgment is a reopened judgment.

Two differences between Rule 60(b) relief and mandate recalls come to mind, but neither weighs in favor of permitting the former to undermine finality of criminal judgments any more than the latter. One difference is that the procedure for obtaining relief from a judgment at the district court level is set out in Rule 60(b), while there is no comparable Federal Rule of Appellate Procedure that sets out the procedure for recalling a mandate once it has issued, *see generally* Fed. R.App. P. 41 (governing mandates). Rule 60(b), however, provides only the procedural framework, while the substantive law governing relief from judgments at the trial level is supplied by decisional law, *see* Fed. R.Civ.P. 60(b) advisory committee's note ("It should be noted that Rule 60(b) does not assume to define the substantive law as to the grounds for vacating judgments, but merely prescribes the practice in proceedings to obtain relief."), just as the substantive law applicable to mandate recalls is to be found in court decisions, *see Calderon*, 523 U.S. at 549–50, 118 S.Ct. at 1498 ("the courts of appeals are recognized to have an inherent power to recall their mandates, subject to review for an abuse of discretion"). So, there is no real difference in that respect. And in any event, Rule 60(b) is itself subject to the limitation of Rule 81(a)(2), which provides that the rule does not apply to habeas corpus proceedings to the extent that the practice in them is set forth in statutes, and the AEDPA is such a statute.

The other difference between Rule 60(b) relief and mandate recalls is that an appellate court generally has less discretion to reopen judgments by recalling its mandate than a district court has to reopen them under Rule 60(b). *Compare Calderon*, 523 U.S. at 549–50, 118 S.Ct. at 1498 (power to recall mandate to be exercised only in extraordinary circumstances) *with Bennett*, 295 F.3d at 807 (describing a district court's authority to grant Rule 60(b) motions as one involving "broad discretion"); *Marquip, Inc.*, 198 F.3d at 1369 ("the district court's broad discretion to apply Rule 60(b)"); *Hoult*, 57 F.3d at 3 ("district courts enjoy broad discretion in deciding motions brought under Rule 60(b)"); *Lee*, 936 F.2d at 979 ("A trial judge has broad discretion to grant Rule 60(b) relief from judgment."). However, that difference shows there is even more need to restrict the use of Rule 60(b) in habeas cases, because the broader the discretion to upset final judgments, the greater the threat to the finality interests that drove the Supreme Court's decision in *Calderon*. Everything the Supreme Court said about why mandate recalls must be given a more restricted role in habeas cases than in other cases applies in at least equal, and perhaps greater, measure to reopening judgments under Rule 60(b).

For all of these reasons, a Rule 60(b) motion at the trial level is the equivalent, for all present intents and purposes, of a motion to recall the mandate at the appellate level. *See Burris v. Parke*, 130 F.3d 782, 783 (7th Cir.1997) ("Appellate courts agree that a post-judgment motion under Fed.R.Civ.P. 60(b) in the district court, or the equivalent motion in the court of appeals—which is to say, a motion to recall the mandate—is a 'second or successive' application for purposes of § 2244(b)."). That is why it is no surprise that the two often travel together. In *Calderon* one day the petitioner filed in the appellate court a motion to recall the mandate, and the next day he filed in the district court a Rule 60(b) motion containing the same grounds and allegations. *Calderon*, 523

U.S. at 546, 118 S.Ct. at 1496. In the *Mobley* case that we have before us now, the petitioner filed in this Court his motion to recall the mandate on the same day he applied to us for a certificate of appealability to appeal the district court's denial of his Rule 60(b) motion, and both of those attacks on the final judgment denying him habeas relief were based on the same ground and allegations. *Mobley*, 306 F.3d at 1099–1100.

To a petitioner it does not matter whether he gets the final judgment against him reopened through a mandate recall or through a Rule 60(b) motion. To the State it does not matter, because the injury to its interests is the same regardless of which procedural weapon is used to inflict the wound. To us it should not matter which procedure is used, either; in habeas cases both should be governed by the same principles and be subject to the same restrictions.

[9] We conclude that those principles which were discussed, and those restrictions which were set out, by the Supreme Court in *Calderon* apply to attempts to reopen final judgments under Rule 60(b). That means in a § 2254 case a petitioner's Rule 60(b) motion to reopen the judgment "can be regarded as a second or successive application for purposes of § 2244(b)," and should be so regarded because "[o]therwise, petitioners could evade the bar against relitigation of claims presented in a prior application, or the bar against litigation of claims not presented in a prior application." *Calderon*, 523 U.S. at 553, 118 S.Ct. at 1500 (citations omitted). Because a petitioner's attempt to reopen a final habeas judgment pursuant to Rule 60(b) is to be treated as an application to file a second or successive petition, it ordinarily should be dismissed by the district court pursuant to § 2244(b)(4).[10]

[10] Of course, if the grounds of relief stated in the Rule 60(b) motion satisfy the stringent requirements of § 2244(b)(1) & (2), the petitioner should put those grounds in a habeas petition and move under § 2244(b)(3)(A) for an order from the court of appeals authorizing the district court to consider it. The point of the rule we announce today is that the petitioner may not get around the statutory restrictions on second or successive petitions by filing a Rule 60(b) motion, unless the grounds of the motion fit within one of the two exceptions we are about to discuss.[11]

10. In *Castro v. United States*, — U.S. —, 124 S.Ct. 786, 157 L.Ed.2d 778 (2003), the Supreme Court held that when faced with a motion by a *pro se* federal prisoner that is not labeled as a § 2255 motion, a district court cannot without more recharacterize the motion as one under § 2255. The court must inform the prisoner that the recharacterization being contemplated will subject his subsequent filings to the restrictions on second or successive filings, and it must provide him with an opportunity to amend or withdraw the initial filing. If the court does not do that, the recharacterized filing cannot be counted as a § 2255 motion for purposes of applying the restrictions against second or successive motions. *Id.* at 792.

That is not what we have here. None of the prisoners before us had his initial filing recharacterized by the district court. All their initial pleadings were filed under § 2254 or § 2255, were labeled as such by the prisoner, and were treated by the court accordingly. The *Castro* decision does not extend beyond initial filings, and nothing the Supreme Court said or did in that case implies that the § 2244(b) restrictions can be evaded by the simple expedient of labeling second or successive filings to be something they are not.

11. Nor may a petitioner circumvent the restrictions on second or successive petitions by the simple expedient of filing an independent action aimed at the judgment denying habeas relief. *See generally* Fed.R.Civ.P. 60(b) (3d sentence). All of the reasoning and all of the principles we have been discussing apply fully to any independent action designed to set aside or reopen a judgment denying federal

E.

[11] Because the *Calderon* reasoning does apply to Rule 60 motions as well as mandate recalls in habeas cases, the two extra-statutory exceptions discussed in that decision also apply. This means that there are two different circumstances or exceptions in which a petitioner will be permitted to file a Rule 60 motion and have it treated by the district court as a motion under that rule instead of as a non-authorized (by the appellate court pursuant to § 2244(b)(3)(A)) application to file a second or successive petition.

One circumstance is where the final judgment is recalled or reopened to correct clerical errors in the judgment itself. As the Supreme Court explained, "[t]he State can have little interest, based on reliance or other grounds, in preserving a mandate not in accordance with the actual decision rendered by the court." *Id.* at 557, 118 S.Ct. at 1501. The same is true, of course, when a judgment is reopened under Rule 60(a) to correct a mere clerical mistake. So, there is that exception.

The other circumstance in which a petitioner will be able to file a Rule 60 motion and have it treated by the district court as a motion under that rule instead of as a non-authorized second or successive petition is where there was fraud upon the federal court which led to the denial of the habeas petition. In its *Calderon* opinion, the Supreme Court said: "This also is not a case of fraud upon the court, calling into question the very legitimacy of the judgment. *See Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250 (1944)." *Calderon*, 523 U.S. at 557, 118 S.Ct. at 1501–02. It is unclear whether with those words (contained in a paragraph which begins "We should be clear about the circumstances we address in this case ....") the Court meant to recognize a fraud exception or simply to reserve for later the question of whether that exception exists. Since we have before us one petitioner who contends that he is entitled to the benefit of a fraud exception, we cannot put off until another day the decision of whether one exists. We think it does.

A State's interest in the finality of a judgment denying federal habeas corpus relief is not compelling if that judgment would not have been obtained but for fraud that its agents perpetrated upon the federal court. Rule 60(b)(3) permits a judgment to be reopened for fraud, and the savings clause of the rule specifies that it does not "limit the power of a court ... to set aside a judgment for fraud upon the court." To that extent, Rule 60(b) has a field of operation in habeas cases. The exact parameters of the fraud exception may have to be worked out on a case-by-case basis, but the Supreme Court's citation to the *Hazel-Atlas* decision in its *Calderon* opinion, 523 U.S. at 557, 118 S.Ct. at 1501–02, is instructive. (The *Hazel-Atlas* decision is cited by the commentary to Rule 60(b) as an illustration of a situation involving a fraud perpetrated upon a court. *See* Fed.R.Civ.P. 60(b) advisory committee's note.)

In the *Hazel-Atlas* case the Hartford Company had been unsuccessful in its efforts to obtain a patent for a particular way of pouring glass into molds, called the "gob feeding" method. Its application faced "apparently insurmountable Patent Office opposition." *Hazel-Atlas*, 322 U.S. at 240, 64 S.Ct. at 998. To overcome that opposition, a lawyer for the company, with his client's knowledge and assistance, drafted an article for publication in a trade journal that described the gob feeding method as "a remarkable advance in the art of fashioning glass by machine," and "one of the two 'revolutionary devices' with which workmen skilled in bottle-blowing had been confronted since they had organized." *Id.* at 240–41, 64 S.Ct. at 998–99. The fraud in the fraudulent scheme was passing off the overblown advocacy penned by Hartford's attorney as a fact-based testimonial independently written by a disinterested expert in the field. That was accomplished by having the head of a national union of glass blowers sign the article as its purported author even though he had nothing to do with writing it. *Id.*

The phony article was published, and it had the intended effect. After the article was pointed out to the Patent Office, it issued Hartford a patent for the process. Hartford then filed a patent infringement suit against Hazel-Atlas, which was using that method to produce glass. Hartford did not emphasize the bogus article to the district court, and that court ruled against it. *Id.* at 241, 64 S.Ct. at 999. In the court of appeals the attorneys for Hartford, one of whom had been involved in the spurious article scheme, directed the court's attention to the article, and as the Supreme Court put it, "[t]he reference was not without effect." *Id.* In reversing the district court and directing that judgment be entered in favor of Hartford, the court of appeals quoted copiously from the article to support its holdings that the district court had erred, that the patent was valid, and that there had been infringement. *Id.*

Despite Hartford's payment of hush money to the national union leader who had signed the phony article, the fraud was ultimately discovered years after the judgment that it had been used to procure had become final (finality of judgment being defined by the term rule, in those days). The court of appeals refused to set aside its judgment in favor of Hartford, but the Supreme Court reversed. After recounting "this sordid story," *Id.* at 243, 64 S.Ct. at 1000, the Court held that the term rule was no bar to correcting the effect of the fraud, that Hazel–Atlas' delay in uncovering the fraud was not a bar, and that the effectiveness of the fraudulent article for Hartford's case in the court of appeals could not be disputed. *Id.* at 244–47, 64 S.Ct. at 1000–02.

The Supreme Court explained in *Hazel-Atlas* that, "[t]his is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury," but instead was "a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals." *Id.* at 245–46, 64 S.Ct. at 1001. The court of appeals decision was reversed with directions for it to recall the original mandate it had issued years before, to issue a new mandate directing the district court to set aside the judgment in favor of Hartford, and to take any additional action that was necessary and appropriate. *Id.* at 251, 64 S.Ct. at 1004.

That case is the example the Supreme Court gave in *Calderon* of the kind of fraud which justifies upsetting the finality interests that arise when a State criminal judgment has been left standing after a full round of federal habeas review. *Calderon*, 523 U.S. at 557, 118 S.Ct. at 1501–02. With that and the other teachings of the *Calderon* decision in mind, we will turn to the particular circumstances of the two § 2254 cases before us, but before doing so we pause to consider the competing approach the dissent would have us adopt.

The dissent's functional inquiry, as we understand it, is adopted from the First

habeas relief. Accordingly, such independent actions are subject to the § 2253(c) requirement that a certificate of appealability be obtained before the denial of one may be appealed, and relief from a judgment denying a habeas petition may not be granted in an independent action except in the two circumstances we are about to discuss in which relief may be granted on a Rule 60(b) motion.

Circuit's opinion in *Rodwell v. Pepe*, 324 F.3d 66, 70 (1st Cir.2003), which ignores the Supreme Court's *Calderon* decision. Although the critically important *Calderon* decision had been on the books for five years before the First Circuit released its *Rodwell* opinion, that opinion does not even mention the Supreme Court decision. Uninformed by *Calderon*, the First Circuit's approach requires a court to determine in every case where a Rule 60(b) is filed seeking to set aside a habeas judgment whether the motion's factual predicate "deals primarily with the constitutionality of the underlying state [or federal] conviction or sentence," or "deals primarily with an irregularity or defect in the procurement of the judgment denying habeas relief." Dissenting Op. at 1296–1297 (quoting *Rodwell*, 324 F.3d at 70) (alterations added by dissent). What exactly "deals primarily" means as it applies to the myriad of factual predicates arising in these type of cases would, of course, be subject to continuous debate and litigation. As a result, the states would be denied the "real finality" or "actual finality" of judgment the Supreme Court says they are entitled to have. *Calderon*, 523 U.S. at 556–57, 118 S.Ct. at 1501–02.[12]

Nodding slightly to that inevitable consequence, the dissent drops a footnote to assure us that it would emphasize to district courts that when applying Rule 60(b)(6)—only one of the six subdivisions of the broadly worded rule—they are to exercise "special caution" in order to avoid eviscerating the provisions of § 2244. *See* Dissenting Op. at 1297 n. 20. We are not assured.

Special caution is difficult to define and impossible to police in the fuzzy area of debating whether the factual predicate of a motion "deals primarily" with the constitutionality of the underlying judgment, or "deals primarily" with some irregularity or defect in the previous judgment denying relief from that earlier judgment. The same is true about "special caution" in determining how to exercise the broad discretion that district courts are given to decide whether to set aside judgments on such grounds as "mistake, inadvertence, surprise, or excusable neglect," Rule 60(b)(1), and because of "newly discovered evidence," Rule 60(b)(2), as well as for "any other reason justifying relief from the operation of the judgment," Rule 60(b)(6).

In sum, the Supreme Court had good reasons for recognizing in *Calderon* that the nature of habeas cases and the critical importance of the finality and comity interests they affect require special rules for motions to recall the mandate in them, and

12. The fuzziness of the test the dissent would have us adopt is illustrated by the inconsistent way the dissent apparently would apply it in two materially identical circumstances. The dissent discusses our pre-AEDPA decision of *Lindsey v. Thigpen*, 875 F.2d 1509, 1512 (11th Cir.1989), without concluding that decision was wrong to apply the certificate requirement to an appeal by a petitioner who had unsuccessfully sought Rule 60(b)(6) relief from the district court on two grounds. One of those grounds was that the controlling law applicable to a claim he had raised in his initial petition, which was denied, had been changed in a decisive way by an intervening Supreme Court decision. *See* Dissenting Op. at 1300–1301. That attempt by Lindsey to get a judgment denying habeas relief set aside because of a change in the law is seen by the dissent as one of those "misuses of Rule 60(b)." *Id.* at 1300–1301. Yet, when it comes to Gonzalez's attempt to use the same rule to get a judgment denying habeas relief set aside because of a change in controlling law, the dissent tells us that "Rule 60(b) is the perfect vehicle for invoking the change-in-the-law exception to the mandate rule." *Id.* at 1308. Rule 60(b), we are assured, is "tailor made for this situation." *Id.* Use of the rule is seen as non-fitting and even abusive in a situation involving a change in the controlling law in one case, while use of the same rule is seen as just perfect in another case involving a change in the controlling law.

for insisting that lower courts abide by those rules. The same is true of the trial level analog of a motion to recall the mandate in a habeas appeal, which is the Rule 60(b) motion to re-open a judgment denying habeas relief. Besides, *Calderon* is a Supreme Court decision, so we must follow it regardless of whether we would have arrived at a different approach. The dissent's quarrel is really with the Supreme Court's *Calderon* decision.

V.

We now apply the lessons we have derived from *Calderon*, along with the two exceptions that decision recognized, to the two habeas cases remaining before us.

A.

[12] Gonzalez does not contend that there was any clerical error in the final judgment denying him federal habeas relief, or that fraud was used to obtain that judgment. His sole contention is that the judgment was wrong, because the subsequently released decision in *Artuz v. Bennett*, 531 U.S. 4, 121 S.Ct. 361, 148 L.Ed.2d 213 (2000), shows that the "properly filed" language of § 2244(d)(2) was misinterpreted to deny him relief. He is attacking the merits of that decision—the term "merits" referring to the correctness of the decision itself even though the ground of this particular decision was the statute of limitations, an affirmative defense.

Gonzalez's Rule 60(b) motion is an attempt to relitigate a claim that has already been presented in a prior application and rejected, which means it must be dismissed under § 2244(b)(1). As the Supreme Court explained in *Calderon*, "[o]therwise, petitioners could evade the bar against relitigation of claims presented in a prior application." *Calderon*, 523 U.S. at 553, 118 S.Ct. at 1500. An error of law, even one demonstrated by an intervening decision, does not fit either of the extra-statutory exceptions to the rule we have borrowed from *Calderon* and announced today. If it were otherwise, a habeas petitioner could use Rule 60(b)(6) to re-open a judgment denying habeas relief based upon a new decision implicating the correctness of the denial of relief in his case, even if that decision came ten, twenty, or thirty years after the judgment had been rendered, and even if it had not been made retroactively applicable to his case.[13]

13. The only circumstance in which Congress permitted a final habeas judgment to be re-opened because of a new decision is where the petitioner asserts for the first time a claim that "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." § 2244(b)(2)(A). Gonzalez's claim fails to meet the requirements of that exception to the bar against second or successive claims.

This case sharply illustrates the difference between how our approach treats the restrictions contained in § 2244(b)(2) and how the dissent would treat them. Under our approach § 2244(b)(2)(A) still serves an important function. It serves to limit the circumstances in which a judgment denying habeas relief can be re-opened based upon a new decision. If the stringent requirements of that carefully drafted statutory provision are met, a new decision can be used to re-open the judgment, but not otherwise.

By contrast, under the dissent's position, § 2244(b)(2)(A) would serve no purpose whatsoever. Why would a prisoner seeking to benefit from a new decision ever seek to obtain permission to file a second or successive petition by meeting the stringent requirements of that statutory provision when he would have a much easier time of it filing a Rule 60(b)(6) motion? Under the dissent's position, relief is available under that rule even if the new decision (as in this case) is not one of constitutional law, and even if the Supreme Court has not made that decision retroactively applicable to cases on collateral review. The dissent says that "Rule 60(b) is the perfect vehicle for invoking the intervening-change-in-the-law exception." Dissenting Op. at 1308. It is, only if one thinks that a statutory provision specially targeting and

There would be no finality. Because in Gonzalez's case there is no clerical error and there is no allegation of fraud affecting the prior habeas proceeding, the district court properly denied his Rule 60(b) motion.

B.

[13] Mobley contends that the fraud exception applies to permit his Rule 60(b) motion to be decided under that rule without being subject to the § 2244(b) bar on second and successive petitions. However, his effort to establish that the claim contained in his motion fits within the fraud exception falls short. The claim is that Andrew Fuller, who testified at the sentence stage as the former prosecutor in the case, gave false testimony about the position of the victim's family regarding the sentence Mobley should receive for the murder. We begin by putting that testimony in context.

At the sentence stage of the trial (actually the retrial), Mobley put in evidence through the testimony of one of his attorneys that Mobley had offered to plead guilty to any crime with any sentence, so long as the sentence was not death. How that evidence is mitigating is not clear, but the theory may have been that the offer reflected well on Mobley because it demonstrated a willingness to accept some punishment for the cold-blooded murder he had committed.[14] If that was the theory it is a stretch, because Mobley's plea efforts simply show a desire to save his own skin, a willingness to deal in order to avoid the full penalty for his crime.

To Mobley's evidence that he had offered to plead guilty, the State responded with the testimony of former prosecutor Fuller, who explained to the jury why he had rejected Mobley's plea offer. The Georgia Supreme Court had indicated earlier in the interlocutory appeal in the case that if Mobley's plea offer came into evidence, the reasons that Fuller rejected the offer could come in as well. *See Mobley v. State*, 262 Ga. at 810–11, 426 S.E.2d at 152–53. Fuller's testimony was not for the purpose of establishing an aggravating circumstance, but instead was for the purpose of weakening whatever small mitigating effect otherwise might arise from evidence of Mobley's attempt to escape a death sentence by plea bargaining. The factual issue being explored was not whether the family of the victim, John Collins, supported a death sentence for his murder, but why the district attorney at that time had decided to seek one.

The transcript of the sentence stage shows Fuller did not testify that the victim's family was firm in wanting a death sentence, and he never told the jury that the family's feelings were a material consideration in his decision to seek death. Instead, he testified that "without question" the decision about the punishment to seek in a capital case "falls on the shoulders of the district attorney," and while district attorney he had made that decision. Although Fuller generally listened to the victim's family's views about the penalty, their views were, in his words, only "a small percentage factor on the scale of things." He explained that: "I want them to appreciate the fact that I make the decision. And families generally—and this family did not want to make the decision, they don't want to come to a meeting after what they've been through . . . they don't want to make the decision, and it's not their decision to make, anyway." He added: "But, yeah, I listened to them and I want to give every opportunity to everybody to have their input in a case because it is—it's a big decision."

When asked point blank how big a factor the family's position was in his decision to seek a death sentence, Fuller answered that: "90, 95 percent of the decision" was "based on the evidence I see that describes and defines the defendant for me." He testified he had concluded that the facts called for a sentence of death in the case, and although the family supported his decision to seek it they had never pressured him, and they had actually told him, "[i]t is your decision, we put our trust in you." During cross-examination, Mobley's counsel asked: "The Collins family, you alluded to this, they have never pushed you one way or the other in this case, is that correct?" Fuller answered: "That is correct." He was asked: "They have always deferred to your judgment at the time as to what should be done, correct?," to which he answered: "Yes."

In his testimony at the sentence stage, Fuller did not simply deny that the views of the family were a significant factor in his decision to seek a death sentence, he elaborated on the more important factors that had led him to his decision. The case against Mobley for the robbery and murder of John Collins was a strong one. The evidence included a confession and the recovery of the pistol used in the killing, which Mobley had thrown out after the crime. The murder was a merciless, cold-blooded, execution-style killing stemming from a well-planned robbery of a Domino's Pizza franchise. Mobley marched Collins to the back where he forced him to get down on his knees, and while Collins was begging for his life Mobley shot him in the back of the head at close range. From those facts alone, in Fuller's words, "it became glaringly apparent that this was a capital case and I would proceed [with it] as a capital case." But there was more, a lot more, that cemented Fuller's decision to insist on a death sentence.

Before the trial Fuller learned that Mobley had spoken to another inmate in a disparaging way about how Collins, while kneeling, had begged for his life. Then Fuller learned Mobley had said that he wanted to get out of jail, because "he knew where he could get a job real quick, when he got out of jail, at Domino's Pizza because he knew there was a vacancy." As if that were not enough, Fuller found out that Mobley had gotten himself a jailhouse tattoo of the Domino's Pizza symbol. Fuller's reaction: "I mean, I could not believe it, I could not believe it."

Still, there was more. Mobley got into a confrontation with a deputy about aspirin or some similar medication, and as Fuller related it to the jury: "Mr. Mobley told the deputy that he was looking more and more like a Domino's Pizza delivery boy." Fuller's reaction: "Again, I would have to say I couldn't believe it, you know." Finally, Fuller learned that Mobley, while he was awaiting trial, had participated in the rape of another inmate.

In all of those statements and actions of Mobley, Fuller saw: "[P]ure unadulterated meanness. It was nothing but pure unadulterated meanness in my viewpoint." Fuller was determined to seek the death penalty "for the protection of the people of the State of Georgia." When asked whether there was ever a point from the beginning of the case throughout the prosecution when he ever gave serious consideration or came close to not seeking the death penalty and to accepting the plea offer, Fuller answered: "Never." When asked if he had ever questioned the deci-

narrowing the circumstances in which that exception should be invoked should be rendered perfectly meaningless.

14. The defense's mitigation theory was not that Mobley's offer to plead showed any kind of remorse. We know that, because the defense was adamant throughout the sentence hearing that Mobley was a sociopath who could not feel remorse, and for that reason he should not be faulted for acting in a remorseless way during and after the murder.

sion he had made to seek the death penalty, Fuller answered: "Never."

The closing arguments at the sentence stage of Mobley's trial show that no one interpreted Fuller's testimony to mean that the victim's family had been strong for a death sentence or that their feelings had affected Fuller's decision to seek one. The position of the victim's family about the proper penalty in the case was never even alluded to by the prosecution during its lengthy closing argument. It was, however, brought up by the defense. During his closing argument defense counsel reminded the jury that Fuller had testified that the family had not demanded the death penalty but instead had left up to Fuller the decision about the penalty to seek. Defense counsel argued that was a reason the jury should not impose a death sentence.

Those are the facts. Here are Mobley's allegations—and we stress that so far they are only allegations, not supported by so much as a proffered affidavit. In his Rule 60(b) motion, Mobley alleges that Fuller had told the victim's family that life without parole was not a sentencing option, and after using that misrepresentation to secure their support for a death sentence Fuller testified before the sentencing jury that the family did support his decision to seek death, knowing all along that the family would not have supported it if they had known life without parole was an option.

[14] To the extent Mobley's claim is that Fuller violated his constitutional rights by defrauding the family into giving him its support for a death sentence, the claim is without any legal basis. A defendant has no constitutional right to have the prosecutor explain the law accurately to the victim's family, and even if such a far-fetched constitutional right were created it would not be available to a petitioner for whom there is already a final judgment denying federal habeas relief.

To the extent Mobley's claim is that Fuller's testimony at the sentence stage about the family's support defrauded the jury into returning a death sentence, the claim is not about fraud on the federal courts. As Judge Tjoflat explained when the case was before the panel, the fraud Mobley alleges was not committed when the case was before the federal habeas court but earlier when it was before the state courts. *Mobley*, 306 F.3d at 1106 (Tjoflat, J., dissenting) ("Read in the best possible light, Mobley's allegations imply that the State may have committed a fraud upon *the Georgia superior court* by proffering Fuller's allegedly false testimony during Mobley's sentencing.").[15] Fuller did not testify in the federal habeas proceeding, and the claim Mobley wants to present at this late date was not presented during that proceeding.[16] The fraud exception to our rule that 60(b) relief will not be granted to reopen final judgments denying federal habeas relief applies where the fraud was perpetrated on the federal court and resulted in the denial of federal habeas relief, not where the fraud was perpetrated on a state court. To the extent Mobley is asserting that the alleged fraud on the state court violated some

15. We agree with those statements from Judge Tjoflat's dissenting opinion in *Mobley* that we quote in this opinion, but beyond that we do not adopt his opinion in that case or its approach.

16. Mobley did raise in his federal habeas petition a claim that Fuller had lied during his state trial testimony but that was a different claim about a different part of Fuller's testimony, and that claim was held to be procedurally barred anyway, without any decision about its merits. *Mobley v. Head*, 306 F.3d at 1106 n. 10 (Tjoflat, J., dissenting).

federal constitutional right of his, he is simply putting forward a new federal constitutional claim that was not presented in his earlier habeas petition. It is a classic successive petition claim subject to the § 2244(b)(2) restrictions, which this claim does not meet. It is not a claim based upon a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court, § 2244(b)(2)(A). Nor is it a claim based upon newly discovered evidence which, when the evidence is considered as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense, § 2244(b)(2)(B).

We do not mean to imply that the only defect in Mobley's fraud theory involves the court on which the alleged fraud was perpetrated. There can be no fraud unless the falsehood is material, and here the alleged falsehood is immaterial. After all, we are talking about one minor aspect of a former prosecutor's explanation about why he had rejected a conditional guilty plea offer of the defendant. And the support of the victim's family for a death sentence, even if it was obtained by the prosecutor's misrepresentation, counted for little in the prosecutor's decision making process, a process that he explained in great detail to the jury.

The mitigating weight of a defendant's attempt to avoid a death sentence by offering to plead guilty is so slight, if it exists at all, that even undiminished the effect would hardly register. And the only mention during closing arguments of the allegedly false part of the former prosecutor's testimony was by defense counsel who cited that testimony as a reason for the jury not to impose a death sentence. It is no wonder that the state trial court, when considering this fraud claim, concluded that any misrepresentations or false testimony by Fuller along these lines was immaterial to the death sentence the jury returned in this case. *See Mobley*, 306 F.3d at 1099.[17]

For all of these reasons, Mobley's case does not come within shouting distance of the fraud exception outlined in the *Hazel-Atlas* decision, where there was "a deliberately planned and carefully executed scheme" participated in by attorneys in a federal proceeding to defraud a federal court, 322 U.S. at 245–46, 64 S.Ct. at 1001, with carefully constructed bogus evidence which not only was presented to that federal court but which also affected the federal court's decision. *Id.* at 241, 244–47, 64 S.Ct. at 997, 1000–02. Mobley is not entitled to have the judgment denying him federal habeas relief reopened on this or any other basis.[18] The district court did not abuse its discretion in denying his Rule 60(b) motion.

VI.

In conclusion, a Rule 60(b) motion seeking to reopen the judgment in a § 2254 or § 2255 case should be denied by the district court, unless it is filed to correct a clerical mistake (meaning it is really a Rule 60(a) motion) or is filed pursuant to

17. We probably should add that the jury was presented with evidence that Mobley had committed six other robberies in the three weeks between his murder of Collins and his arrest for it.

18. The State of Georgia contends that even if there had been fraud it is not responsible because Fuller was no longer a prosecutor at the time he testified; he was then a state court judge. We need not decide how the fact that Fuller was not an attorney for the state in the proceeding impacts the analysis, because it does not matter. Even if he had been the district attorney at the time of his testimony in the sentence proceeding, that would not change our conclusion.

Rule 60(b)(3) to remedy a fraud agents of the government perpetrated on the federal court. No appeal from the denial of a Rule 60(b) motion seeking to reopen a judgment denying § 2254 or § 2255 relief may proceed unless a § 2253 certificate of appealability is issued.

Mobley's application for a certificate of appealability is GRANTED, but the district court's denial of his Rule 60(b) motion is AFFIRMED. His motion to recall the mandate is DENIED, and the stay of execution entered on his behalf by the panel is VACATED. Any other applications or motions Mobley has filed are DENIED.[19]

Lazo's application for a certificate of appealability is DENIED.

Gonzalez's application for a certificate of appealability is GRANTED, but the district court's denial of his Rule 60(b) motion is AFFIRMED.

EDMONDSON, Chief Judge, specially concurring in part and dissenting in part:

In these appeals, we are called upon to clarify the interaction of two laws which Congress has approved: Fed.R.Civ.P. 60 and AEDPA. As I understand our duty in such instances, we must give each all the force that we can. *See, e.g., Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 95 S.Ct. 335, 354, 42 L.Ed.2d 320 (1974) ("A new statute will not be read as wholly or *even partially amending* a prior one unless there exists a positive repugnancy between the provisions of the new and those of the old that cannot be reconciled.") (emphasis added). I agree, however, that AEDPA would trump Rule 60 when, and to the degree, an irreconcilable conflict arises. I believe that Judge Tjoflat has the better understanding of how these laws interact: his view seems more correct to me because it leaves Rule 60 more intact as well as crediting AEDPA.

The Supreme Court's decision in *Calderon*, I think, does not control the present cases. In *Calderon*, the Court did not deal with Rule 60 and was not governed by AEDPA; so, the Supreme Court did not grapple (as we do now) with the duty to give the fullest possible credit to two different laws, each of which Congress had approved. I cannot agree that extending *Calderon*—an inherent-judicial-powers case in which the Supreme Court acted not only as interpreter of laws, but also as supervisor of lower courts—is either necessary or proper for the present appeals.

I suppose that the sharp-edged formulation today's Court makes of Rule 60 will be easier for courts to apply. It might be easier because this approach seems to require less deliberate study of the pertinent motion—study to determine accurately not just the name of the pertinent motion, but the function of the motion (is it in reality a claim of illegal detention: a habeas petition?)—than would be required by the law as Judge Tjoflat understands it. For this reason and others, I personally like the ingenious formulation today's Court makes of Rule 60 in habeas cases.

If I were the policy-maker for the nation, I might embrace today's Court's formulation. (Perhaps Congress will too.) But, of course, federal judges are not the rightful makers of policy in this sphere. And we cannot properly favor what is convenient over what is true. And what, to me, is truly required jurisprudentially in a case like this one is the approach that gives both of the laws Congress has approved their fullest possible force. Moreover, I am confident that judges have the ability to apply the law as Judge Tjoflat has found it: it is hornbook law that courts are to determine the legal effect of motions by the motions' substance rather than by their titles.

I know of the frustrations caused by the lack of finality in litigation. I personally am keen for more finality in the criminal justice process. But today, the finality that we as judges can rightly impose on the criminal process is no more finality than Rule 60 and AEDPA will allow when these laws are each faithfully given the fullest possible force. In the light of this principle, I join in the results Judge Tjoflat would reach in these appeals.

19. There is some confusion about whether Mobley filed, or merely lodged with this Court without subsequently filing, an application for a certificate to permit him to file a successive habeas petition. If he did file that application, it is denied, because it fails to fit within the requirements of § 2244(b).

TJOFLAT, Circuit Judge, specially concurring in part and dissenting in part.[1]

I.

Federal Rule of Civil Procedure 60(b) authorizes the district courts to relieve a party to a civil action from the force of a final judgment on the following grounds:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence [the party] could not have ... discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Additionally, under what has been labeled Rule 60(b)'s "savings clause,"[2] the district courts retain the power "to entertain an independent action to relieve a party from a judgment, order, or proceeding ... or to set aside a judgment for fraud upon the court."

Today, the majority today holds that, with the exception of the ground provided by Rule 60(b)(3),[3] the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. No. 104-132, 110 Stat. 1214, precludes the district courts of the Eleventh Circuit from entertaining Rule 60(b) motions filed by prisoners who seek the vacation of the district court's judgment denying them habeas corpus relief.[4]

1. I join the majority in affirming the district court's judgment in *Mobley*. I specially concur in the majority's judgment in *Lazo*. The majority refuses to grant Lazo a certificate of appealability and therefore effectively affirms the district court's judgment denying his Rule 60(b) motion. Because the district court lacked subject matter jurisdiction to entertain the motion—which was a second or successive motion under 28 U.S.C. § 2255 disguised as a motion under Rule 60(b)—I would affirm its judgment. I dissent, however, from the majority's decision to affirm in *Gonzalez*. In that case, the district court held that it lacked jurisdiction to consider the petitioner's Rule 60(b) motion, and the majority affirms. I believe the district court had jurisdiction. Therefore, I would vacate the district court's ruling and remand the case with the instruction that the district court consider the motion on its merits.

2. *Travelers Indem. Co. v. Gore*, 761 F.2d 1549, 1551 (11th Cir.1985); 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2868, at 396 (1995).

3. The majority also recognizes a second exception. The district courts retain the authority under Fed.R.Civ.P. 60(a) to correct "a mere clerical mistake" in a final judgment. Maj. op. at 1278. None of the three appeals before us implicates this rule; hence, I make no further mention of it.

4. The majority's decision restricts the ability of prisoners to file Rule 60(b) motions and independent actions preserved by the Rule's savings clause. Maj. op. at 1277-1278 n. 11. Before today, such actions were available to habeas petitioners. *See, e.g., Buell v. Anderson*, 48 Fed.Appx. 491, 498 (6th Cir.

To obtain relief on any of the remaining grounds provided by the Rule (i.e., Rule 60(b)(1), (2), and (4)-(6)), the petitioner must apply to this court pursuant to 28 U.S.C. § 2244(b)(3) for leave to file his Rule 60(b) motion.[5] The majority treats any motion based on one or more of those grounds as a second or successive habeas petition ("SSHP")[6] even if the motion contains no constitutional claim at all. The majority also holds that before the petitioner can appeal the denial of a Rule 60(b)(3) motion, either the district court or this court must issue a certificate of appealability ("COA") pursuant to 28 U.S.C. § 2253.

I respectfully dissent from these two holdings because the rationale supporting them is fundamentally flawed. Aside from this, I am convinced that the implementation of the majority's holdings will unnecessarily add to the workload of this court.

This opinion is organized as follows. Part II addresses the majority's first holding, which treats all Rule 60(b) motions—with the exception of those filed under Rule 60(b)(3)—as SSHPs. Part III addresses the majority's second holding, which requires the issuance of a COA before a petitioner can appeal the district court's denial of a Rule 60(b)(3) motion. Part IV describes the practical implications of the majority's holdings. Part V suggests the dispositions we should make in the three consolidated appeals before us.

2002) ("An independent action for relief is an equitable remedy available in civil trials, including habeas proceedings which are conducted under civil rules of procedure."); *Hess v. Cockrell*, 281 F.3d 212, 217 (5th Cir.2002) (denying the habeas petitioner's independent action for relief from adverse judgment because the petitioner failed to establish "[t]he elements of an independent action" as prescribed in *Bankers Mortgage Co. v. United States*, 423 F.2d 73, 79 (5th Cir.1970)). Unless I note otherwise, this opinion applies equally to both Rule 60(b) motions and independent actions preserved by the Rule.

5. Both state and federal prisoners must obtain leave of the appropriate court of appeals before filing second or successive collateral attacks upon their convictions or sentences. A court of appeals may only grant such leave to state prisoners who satisfy the criteria of 28 U.S.C. § 2244(b) or federal prisoners who satisfy the criteria of § 2255. Section 2244(b) provides:

> (b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> (b)(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> (A) the applicant shows that that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Section 2255 provides:

> A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—
>
> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

Throughout this opinion, I analyze the effects of the majority's holdings on litigation involving Rule 60(b). Although I often write in terms of how § 2244's restrictions on successive petitions (filed by state prisoners under § 2254) will impact such litigation, this discussion generally extends equally to § 2255's comparable restrictions on successive motions (filed by federal prisoners under that section). While §§ 2244 and 2255 are not textually identical, their differences are of no consequence in my analysis unless I note otherwise.

6. Here and throughout this opinion, the phrase "second or successive habeas petitions" and the abbreviation "SSHP" refer also to second or successive motions under § 2255.

II.

By treating all Rule 60(b) motions—except those filed under Rule 60(b)(3)—as SSHPs, the majority misunderstands the history and purpose of Rule 60(b), fails to appreciate the functional difference between an SSHP and a Rule 60(b) motion, and misapplies the Supreme Court's decision in *Calderon v. Thompson*, 523 U.S. 538, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998). I address these points in turn and then suggest the course we should follow.

A.

At common law, "the term of court was decisive in determining whether or not the district court had power over its final judgments and decrees." Note, *History and Interpretation of Federal Rule 60(b) of the Federal Rules of Civil Procedure*, 25 Temple L.Q. 77, 78 (1951) [hereinafter "Note, *History*."]. During the term, a court "had full power to vacate or revise [its] judgments." Commentary, *Effect of Rule 60b on Other Methods of Relief from Judgment*, 4 Fed. Rules Serv. 942, 942 (1941). After the term, a party could obtain relief from a judgment only through four types of "remedial devices": (1) one of the ancient writs, i.e., "audita querela, coram nobis, coram vobis, bill[s] of review, and bill[s] in the nature of bills of review"; (2) an "[i]ndependent action[ ] for relief, based on extrinsic fraud, mistake, and accident"; (3) the "[i]nherent power of the court to modify judgments"; and (4) the "[p]ower [of the court] to disregard void judgments." Note, *Federal Rule 60(b): Relief from Civil Judgments*, 61 Yale L.J. 76, 76 n. 3 (1952).

Each of the ancient writs permitted relief in different scenarios. Audita querela, a common law writ, typically "afford[ed] relief to a judgment debtor against a judgment or execution because of some defense or discharge arising subsequent to the rendition of the judgment or the issue of the execution." 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2867, at 394 (Civil 2d ed.1995). Coram nobis and coram vobis, both equitable in nature, sought to remedy "mistakes of fact, not appearing on the face of the record, and but for which the judgment would not have been entered." Commentary, *supra*, at 942–43. If the judgment under attack issued from the King's Bench, the former writ was appropriate; if it issued from any other court, the latter was used. *Black's Law Dictionary* 328 (7th ed.1999). A bill of review in equity would lie upon any of four grounds: (1) "error of law apparent upon the record," (2) "newly discovered evidence," (3) "the occurrence of new matter or new facts after the entry of the decree which make its enforcement inequitable," or (4) "fraud in procuring the decree." James Wm. Moore & Elizabeth B.A. Rogers, *Federal Relief from Civil Judgments*, 55 Yale L.J. 623, 677–79 (1946).

Despite their formal distinctions, however, the ancient writs as a practical matter had confusing and "uncertain boundaries." *Klapprott v. United States*, 335 U.S. 601, 614, 69 S.Ct. 384, 390, 93 L.Ed. 266 (1949). For example, while the usual rule was that audita querela lay only for matters arising subsequent to judgment, many courts granted relief under this writ for matters arising before judgment, thereby blurring the distinction between audita querela and

coram nobis (or vobis). 12 James Wm. Moore et al., *Moore's Federal Practice* § 60 App. 105, at 60 App.–29 (3d ed.2003). The Supreme Court in *Klapprott* recognized that "few courts ever . . . agreed as to what circumstances would justify relief under these old remedies." 335 U.S. at 614, 69 S.Ct. at 390.

The enactment of the Federal Rules of Civil Procedure in 1938 was, in part, an attempt to eliminate the confusion caused by the inconsistent application of these ancient writs. In its original form, Rule 60(b) stated:

> On motion the court, upon such terms as are just, may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding, or (2) to set aside within one year, as provided in Section 57 or the Judicial Code, U.S.C., Title 28, § 118, a judgment obtained against a defendant not actually personally notified.

Moore, *supra*, § 60 App. 10[1], at 60 App.–2. On its face, Rule 60(b) seemed progressive; parties could seek relief from judgments without resort to the ancient writs and without regard to the term of court, subject to the six-month limitations period. But many courts stripped the Rule of its progressivity through traditional common law devices. Some courts, for example, granted motions for relief filed more than six months after final judgment, often based upon their " 'inherent power' to control judgments where the 'term' had not expired." Note, *History*, *supra*, at 78. Other courts "read into [Rule 60(b)] the nebulous writs that had traditionally provided post-term relief." *Id.*

This problem did not go unnoticed. In 1946, Rule 60(b) was substantially amended to read as it does today.[7] In addition to providing six grounds for relief, *see supra* Part I,

> th[e] rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Fed.R.Civ.P. 60(b).

The drafters of modern Rule 60(b) were unconcerned with "the substantive law as to the grounds for vacating judgments." Fed.R.Civ.P. 60 advisory committee's note (1946). Rather, they sought to create a comprehensive procedural scheme, one that would "remove the uncertainties and historical limitations of ancient remedies while preserving all of the various kinds of relief that they afforded." 11 Wright, Miller & Kane, *supra*, § 2851, at 227. The Rule accomplished three tasks. First, it set different time limits for articulating different grounds of relief. Second, the Rule abolished the ancient writs, "shrouded [as they were] in ancient lore and mystery." Advisory committee's note, *supra*. Third, Rule 60(b) established four devices for parties to seek relief from civil judgments:

> 1. *Rule 60(b) motions.* A party may seek relief from a judgment upon any ground enumerated in the Rule.
>
> 2. *Independent Actions.* A party may initiate a new action to seek relief from a judgment. It may bring this action in any district court, not just the one that rendered the judgment from which relief is sought. 11 Wright, Miller & Kane, *supra*, § 2851, at 229.
>
> 3. *Statutory procedures.* A court may grant relief from a judgment without resort to Rule 60(b) as authorized by statute.[8]
>
> 4. *Inherent powers.* Rule 60(b) expressly permits a district court "to set aside a judgment for fraud upon the court."

The best explanation of the interrelationship of Rule 60(b) and the independent actions preserved by the Rule's savings clause is contained in the Fifth Circuit's opinion in *Bankers Mortgage Co. v. United States*, 423 F.2d 73, 78–79 (5th Cir.1970):[9]

> The second procedure contemplated by Rule 60(b) is an independent action to obtain relief from a judgment, order, or proceeding. The . . . saving clause specifically provides that 60(b) does not limit the power of the court to entertain such an action. It is important to emphasize "independent action," as used in this clause, was meant to refer to a procedure which has been historically know simply as an independent action in equity to obtain relief from a judgment. This action should under no circumstances be confused with ancillary common law and equitable remedies or their modern substitute, the 60(b) motion.
>
> When a court grants relief from a judgment or decree by a new trial or rehearing, or by one of the ancillary common law or equitable remedies or their modern substitute, a motion, it is exercising a supervisory power of that court over its judgment; but the original bill, or independent action, to impeach for fraud, accident, mistake or other equitable ground is founded upon an independent and substantive equitable jurisdiction. -
>
> If the litigant's "right to make a [Rule 60(b)] motion is lost by the expiration of the time limits fixed in these rules, the only procedural remedy is by a new or independent action to set aside a judgment upon those principles which have heretofore been applied in such an action." *Id.* at 81 n. 13.

B.

In part because it failed to appreciate this history, the majority overlooks the important distinctions between the motions and independent actions Rule 60(b) authorizes and SSHPs. Like the ancient procedures it replaced, Rule 60(b) was never

7. The minor amendments made since 1946 are of no concern to us here.

8. There are at least three examples in this category. First, Rule 60(b) states that it does not "limit the power of a court to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. § 1655," which prescribes how courts should deal with absent defendants in lien enforcement proceedings. Second, the 1946 advisory committee's note recognizes that "under the Soldiers and Sailors Civil Relief Act of 1940 a judgment rendered in any action or proceeding governed by the [Act] may be vacated under certain specified circumstances upon proper application to the court." Third, "the declaratory-judgment statute [28 U.S.C. § 2202] authorizes the court to grant additional 'necessary or proper relief' based on any judgment entered under it, and a party can seek [such relief] without satisfying the requirements of Rule 60(b)." 11 Wright, Miller & Kane, *supra*, § 2869, at 408.

9. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

intended to permit parties to relitigate the merits of claims or defenses, or to raise new claims or defenses that could have been asserted during the litigation of the case. Rather, the aim of Rule 60(b) was to allow a district court to grant relief when its judgment rests upon a defective foundation.

As applied in the habeas context, the "factual predicate [of a Rule 60(b) motion] deals primarily with some irregularity or procedural defect in the procurement of the judgment denying habeas relief." *Rodwell v. Pepe*, 324 F.3d 66, 70 (1st Cir. 2003). The same is true with respect to an independent action brought under the Rule's savings clause. *See Buell v. Anderson*, 48 Fed.Appx. 491, 498 (6th Cir. 2002) (explaining the elements of an independent action, all of which concern the integrity of the habeas judgment); *Hess v. Cockrell*, 281 F.3d 212, 217 (5th Cir.2002) (same). A true Rule 60(b) motion "seek[s] relief from a federal court's final order entered in a habeas proceeding on one or more of the grounds set forth in" the Rule. *Abdur'Rahman v. Bell*, 537 U.S. 88, 94, 123 S.Ct. 594, 597, 154 L.Ed.2d 501 (2003) (Stevens, J., dissenting). Neither proceeding constitutes a collateral attack on the underlying conviction or sentence.

An SSHP is a different species. Like a first petition for a writ of habeas corpus, an SSHP is a collateral attack upon the applicant's conviction or sentence. After AEDPA, an applicant may seek SSHP relief by asserting "(1) claims that 'rel[y] on a new rule of constitutional law,' and (2) claims that rely on a rule of constitutional law and are based on evidence that 'could not have been discovered previously through the exercise of due diligence' and would establish the petitioner's factual innocence." *Mobley v. Head*, 306 F.3d 1096, 1100–01 (11th Cir.2002) (vacated panel opinion) (Tjoflat, J., dissenting) (quoting 28 U.S.C. § 2244(b)(2)). Thus, SSHPs are concerned entirely with "alleged violations of federal rights" that occurred during the proceedings resulting in the petitioner's conviction or sentence. *Rodriguez v. Mitchell*, 252 F.3d 191, 199 (2d Cir.2001). As I noted in my dissent from the panel opinion in *Mobley*,

> [n]either of [the] types of claims [cognizable under section 2244(b)(2)] challenges the district court's previous denial of relief under 28 U.S.C. § 2254. Instead, each alleges that the contextual circumstances of the proceeding have changed so much that the petitioner's conviction or sentence now runs afoul of the Constitution.

Mobley, 306 F.3d at 1101 (Tjoflat, J., dissenting).

Thus, "the difference [between an SSHP and a Rule 60(b) motion] is defined by the relief that the applicant seeks." *Abdur'Rahman*, 537 U.S. at 94, 123 S.Ct. at 597 (Stevens, J., dissenting). An SSHP,

> like all habeas corpus petitions, is meant to remedy constitutional violations (albeit ones which arise out of facts discovered or laws evolved after an initial habeas corpus proceeding), while a Rule 60(b) motion is designed to cure procedural violations in an earlier proceeding—here, a habeas corpus proceeding—that raise questions about that proceeding's integrity.

Mobley, 306 F.3d at 1101 (Tjoflat, J., dissenting). By granting an SSHP, the district court "invalidat[es]" the conviction or sentence. *Rodriguez*, 252 F.3d at 198. By granting a Rule 60(b) motion, the court "merely reinstate(s) the previously dismissed petition for habeas, opening the way for further proceedings seeking ultimately to vacate the conviction." *Id.*

C.

In defense of its holding that all Rule 60(b) motions—except motions seeking Rule 60(b)(3) relief—are SSHPs that cannot be filed in the district court without leave of this court obtained pursuant to § 2244(b)(3)(A), the majority relies upon the Supreme Court's decision in *Calderon*.

In that case, the petitioner moved the court of appeals to recall its mandate denying habeas relief. *Calderon*, 523 U.S. at 545–46, 118 S.Ct. at 1496.[10] The panel of the court that decided the petitioner's appeal denied his motion. The court thereafter convened en banc to hear oral argument on the question of "whether the panel decision . . . would result in a fundamental miscarriage of justice." *Id.* at 547, 118 S.Ct. at 1497. After hearing argument, the en banc court, acting *sua sponte*, recalled the court's mandate and affirmed the district court's decision. *Id.* at 548–49, 118 S.Ct. at 1497.

The Supreme Court reversed. Acknowledging that in some circumstances a court of appeals has "inherent power to recall [its] mandate[ ]," *id.* at 549, 118 S.Ct. at 1498, the Court concluded that the en banc court's exercise of such power in this case constituted an abuse of discretion, *id.* at 566, 118 S.Ct. at 1506. As for the State's argument that AEDPA barred the court from recalling the mandate, the Court held that AEDPA had no application because the court recalled the mandate on its own initiative, not on the petitioner's motion. *Id.* at 554, 118 S.Ct. at 1500. Nonetheless, the Court had this to say about AEDPA's application when a court of appeals is considering whether to grant a habeas petitioner's motion to recall its mandate:

> In a § 2254 case, a prisoner's motion to recall the mandate on the basis of the merits of the underlying decision can be regarded as a second or successive application for purposes of § 2244(b). Otherwise, petitioners could evade the bar against relitigation of claims presented in a prior application, § 2244(b)(1), or the bar against litigation of claims not presented in a prior application, § 2244(b)(2). If the court grants such a motion, its action is subject to AEDPA irrespective of whether the motion is based on old claims (in which case § 2244(b)(1) would apply) or new ones (in which case § 2244(b)(2) would apply).

Id. at 553, 118 S.Ct. at 1500.

I concur in the majority's view that once a court of appeals issues its mandate in a habeas case, a petitioner's *Calderon*-type motion to recall the mandate, which asks the court of appeals to entertain a new claim or revisit an old claim, constitutes an SSHP as defined by AEDPA.[11] I further observe that *Calderon*, in application, yields this result: the petitioner's motion that a habeas petitioner's petition for rehearing must be filed prior to the court's issuance of its mandate, while the court can still revisit its decision. *See* Fed. R.App. P. 41.

Furthermore, I read *Calderon* to apply only to motions to recall the mandate that ask the court of appeals to entertain new constitutional challenges to a petitioner's conviction or sentence or revisit old ones. I disagree with the majority insofar as it reads *Calderon* more broadly. If the motion to recall the mandate challenged the integrity, rather than correctness, of the appellate decision, that motion would, in my view, fall beyond *Calderon*'s scope. I must confess, however, that such a motion is difficult to imagine.

10. The next day, he moved the district court pursuant to Rule 60(b) to vacate its decision which granted in part and denied in part his application for a writ of habeas corpus. The filing of the Rule 60(b) motion had no bearing on the Supreme Court's eventual decision in *Calderon*, and it has no bearing on our decisions today.

11. I assume here that the majority is only concerned with motions to reconsider an appellate decision after the mandate issues. Despite its treatment of motions to recall the mandate, the majority opinion does not explicitly interpret *Calderon* to treat timely petitions for rehearing as SSHPs. I believe this discrepancy might be explained by the fact

to recall the mandate must be denied. If the motion merely asks the court to revisit its disposition of the claims the petitioner had (unsuccessfully) litigated, § 2244(b)(1) requires that the court deny the motion.[12] If the motion raises new claims, the court will deny it under the time-honored rule that a court of appeals will not consider claims not seasonably presented to the district court in the first instance.[13]

Calderon does not speak to the authority of the district court to grant a habeas petitioner relief under Rule 60(b). The majority believes that it does by analogy.[14] An analogy may appear at first blush, but, to me at least, it disappears when one compares recalling an appellate mandate with the collateral attacks provided by Rule 60(b) and the independent actions the Rule preserves under its savings clause.

By recalling its mandate, the court of appeals may reexamine its decision. *Calderon* permits the court to recall its mandate for such purpose *if* it does so on its own initiative. The fact that *Calderon* bars the court from recalling its mandate (in a habeas case) on the petitioner's motion does not alter the fact that, once the mandate is recalled, the court is in the same position it occupied before the mandate issued. When considering a motion to recall the mandate similar to that addressed in *Calderon*, the court of appeals is not entertaining a collateral attack that questions the integrity or legitimacy of its judgment. *See supra* note 11. Instead, drawing on the same record it had before it when it rendered its decision, the court is simply reconsidering whether to adhere to its decision or come down another way.

The district courts lack the broad power the courts of appeals possess to recall their judgments. If it does not receive a motion filed pursuant to Rules 50(b), 52(b), 59(a) or (e), or act *sua sponte* under Rule 59(d) of the Federal Rules of Civil Procedure no later than "10 days after the entry of judgment," a district court loses jurisdiction to revisit the claims and defenses the judgment resolved.[15] As explained in Part

12. In a case in which, after the court of appeals mandate issued, the Supreme Court handed down a new rule of constitutional law made retroactive to cases on collateral review that would have required the court of appeals to decide a claim in favor of, rather than against, the petitioner, query whether AEDPA, as interpreted in *Calderon*, would permit the court to grant the petitioner's motion to recall the mandate (on the basis of the new rule) or require the court to deny the motion under § 2244(b)(1). If AEDPA would bar the court from granting the petitioner's motion, the petitioner's avenues of relief would be to (1) move the district court pursuant to Rule 60(b)(6) to vacate its decision rejecting the claim, or (2) bring an independent action, as permitted by Rule 60(b)'s savings clause.

13. In denying the motion, although the law would not require it to do so, the court could call the petitioner's attention to § 2244(b)(3)(A) and inform the petitioner that if he wishes to pursue his new claims, he must apply to this court for leave to file the claims in the district court.

14. According to the majority,

> *Calderon*'s lessons about whether and when an appellate court's power to recall a mandate may be used in habeas cases apply with as much force to the question of whether and when a trial court's Rule 60(b) authority to reopen a final judgment may be used in a habeas case. Recalling the mandate to reopen and alter the final judgment in a habeas case is the closest thing on the appellate level to the use of Rule 60(b) to reopen and change a final judgment at the trial level.

Maj. op. at 1275.

15. After it receives a motion filed under one or more of these rules within this 10-day time limit, the court obviously retains jurisdiction beyond the 10 days to rule on the motion. A final judgment that contains injunctive relief may give the court jurisdiction to enforce such relief. Such retention of jurisdiction is not implicated in any of the cases now before us.

II.A, *supra*, Rule 60(b) and the independent actions its savings clause preserves give the court the power to set aside a judgment whose integrity is lacking. What Rule 60(b) and these independent actions *do not* provide is a means for litigants to obtain the district court's reconsideration of the claims and defenses its judgment adjudicated. *See Am. Bankers Ins. Co. v. Northwestern Nat'l Ins. Co.*, 198 F.3d 1332, 1338 (11th Cir.1999) ("[T]he law is clear that Rule 60(b) may not be used to challenge mistakes of law which could have been raised on direct appeal[,]" the implication being that all that the Rule provides is a vehicle for attacking the integrity of the district court's judgment); *Travelers Indem. Co. v. Gore*, 761 F.2d 1549, 1552 (11th Cir.1985) ("[T]he plaintiff cannot use an independent action as a vehicle for the relitigation of issues."); *Bankers Mortgage Co.*, 423 F.2d at 79 (5th Cir.1970) ("The independent action can not be made a vehicle for the relitigation of issues."); *Donovan v. Sovereign Sec. Ltd.*, 726 F.2d 55, 60 (2d Cir.1984) ("[Litigants] may not use proceedings seeking relief from or modification of a judgment under F.R. Civ. P. 60 simply to relitigate matters settled by the original judgment...."); *Kustom Signals, Inc. v. Applied Concepts, Inc.*, 247 F.Supp.2d 1233, 1235 (D.Kan. 2003) ("Like a motion to reconsider, a motion under Rule 60(b) is not a second opportunity for the losing party to make its strongest case, to rehash arguments, or to dress up arguments that previously failed.").

What the foregoing discussion establishes, I believe, is that a legally significant analogy cannot be drawn between a motion to recall an appellate mandate and a motion or independent action brought under Rule 60(b). None of the motions or independent actions authorized by Rule 60(b) should assert that the petitioner's underlying criminal conviction or sentence is infirm on the basis of a constitutional claim that was or was not included in the habeas petition the petitioner litigated to final judgment in the district court. If such motions or independent actions present a constitutional claim, they must be dismissed unless the court of appeals has granted the petitioner leave to file the same in district court. The motions to recall the mandate discussed in *Calderon*, by comparison, seek the adjudication of constitutional claims; they do not constitute collateral attacks on the integrity of the court of appeals's judgment.[16] Hence, they differ from true Rule 60(b) motions and must be denied.

D.

Having distinguished between SSHPs and Rule 60(b) motions, I nonetheless share the majority's general concern that petitioners will disguise the former as the latter to avoid AEDPA's restrictions. We must craft a holding that curtails this abuse.

We do not write on a blank slate here, as virtually all of our sister circuits have addressed this issue.[17] Some circuits have held that all Rule 60(b) motions are SSHPs, regardless of the nature of the claims presented. *See Lopez v. Douglas*, 141 F.3d 974, 975 (10th Cir.1998) (holding without extended discussion that the peti-

16. If the district court judgment the court of appeals affirms is subject to collateral attack, the attack must be mounted in the district court via Rule 60(b), an independent action brought under the aegis of the Rule, or the implementation of one of the exceptions to the mandate rule.

17. I am primarily concerned with the post-AEDPA cases, but also treat the pre-AEDPA cases from circuits that have not since ruled on the issue. For a collection of the pre-AEDPA cases, see 2 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* 1533 n. 16 (4th ed.2001).

tioner's Rule 60(b) motion was an SSHP under AEDPA); *Gee v. Shillinger*, 1998 WL 43155, *1–*2, 1998 U.S.App. LEXIS 2644, *3–*4 (10th Cir.1998) (holding, without specifying exceptions, that Rule 60(b) motions are SSHPs under AEDPA); *McQueen v. Scroggy*, 99 F.3d 1302, 1335 (6th Cir.1996) (holding in a pre-AEDPA context that "a Rule 60(b) motion is the practical equivalent of a successive habeas corpus petition and therefore is subject to a cause and prejudice analysis"). The Second Circuit, on the other hand, appears to have held that Rule 60(b) motions should never be treated as SSHPs. *Rodriguez*, 252 F.3d at 198 ("We now rule that a motion under Rule 60(b) to vacate a judgment denying habeas is not a second or successive habeas petition and should therefore be treated as any other motion under Rule 60(b).").[18]

Most of our sister circuits, however, have come down somewhere in the middle, holding that district courts may recharacterize Rule 60(b) motions as SSHPs under some circumstances. These circuits fall into two subsets. The first subset consists of courts that have declined to hold that all Rule 60(b) motions are SSHPs, but that have not articulated a rule for distinguishing these devices.[19] *See Boyd v. United States*, 304 F.3d 813, 814 (8th Cir.2002) (directing district courts to "conduct[ ] a brief initial inquiry to determine whether the allegations in the Rule 60(b) motion in fact amount to a second or successive collateral attack"); *Thompson v. Calderon*, 151 F.3d 918, 921 & n. 3 (9th Cir.1998) ("We do not foreclose the possibility [that] a 60(b) motion filed after denial of an initial petition for habeas corpus would not have to comply with the AEDPA's successive petition requirements.... [A] bright line rule equating all 60(b) motions with successive habeas petitions would be improper."). The second subset consists of courts that have developed various, if general, rules for governing Rule 60(b) motions. *See United States v. Winestock*, 340 F.3d 200, 206 (4th Cir.2003) ("[D]istrict courts *must* treat Rule 60(b) motions as successive collateral review applications when failing to do so would allow the applicant to 'evade the bar against relitigation of claims presented in a prior application or the bar against litigation of claims not presented in a prior application.' " (citation omitted)); *Rodwell*, 324 F.3d at 70 ("When the motion's factual predicate deals primarily with the constitutionality of the underlying state conviction or sentence, then the motion should be treated as a second or successive habeas petition. This situation should be distinguished from one in which the motion's factual predicate deals primarily with some irregularity or procedural defect in the procurement of the judgment denying habeas relief. That is the classic function of a Rule 60(b) motion, and such a motion should be treated within the usual confines of Rule 60(b).").

18. Although other courts have characterized the Second Circuit's position as absolute, *see, e.g., Rodwell*, 324 F.3d at 69 (stating that "[t]he Second Circuit has ruled categorically" that no Rule 60(b) motions are SSHPs); *Dunlap v. Litscher*, 301 F.3d 873, 876 (7th Cir. 2002) ("The Second Circuit[ ] ... in *Rodriguez* ... did not limit its ruling to [true Rule 60(b) motions]."), I do not wish to mischaracterize its holding. Even after *Rodriguez*, I am unable to say for certain that a litigant in the Second Circuit could maintain a purported Rule 60(b) motion whose true aim is to challenge the underlying conviction on constitutional grounds.

19. The Third and Fifth Circuits may also fall within this category, but their precedent is unclear. *See United States v. Edwards*, 309 F.3d 110, 113 (3d Cir.2002) (holding without extended discussion that even if the district court should have construed the petitioner's motion under 18 U.S.C. § 3582(c)(2) as a Rule 60(b) motion, the court would nonetheless have had to recharacterize the Rule 60(b) motion as an SSHP); *Hess*, 281 F.3d at 214–15 (noting "the parties[ ] dispute [as to] whether or not [the Fifth Circuit] has completely closed the door on Rule 60(b) motions in habeas cases—in other words whether *all* such Rule 60(b) motions *must* be construed as successive petitions," but declining to decide the circumstances under which a Rule 60(b) motion might be proper).

Rather than follow the majority's approach, we should recognize that Rule 60(b) survives in AEDPA's wake and fashion a holding that accounts for the essential differences between Rule 60(b) motions and SSHPs. In this vein, I would adopt substantially the First Circuit's solution to our problem:

> The inquiry must proceed case by case. The [district] court must examine the factual predicate set forth in support of a particular motion. When the motion's factual predicate deals primarily with the constitutionality of the underlying state [or federal] conviction or sentence, then the motion should be treated as a second or successive habeas petition. This situation should be distinguished from one in which the motion's factual predicate deals primarily with some irregularity or procedural defect in the procurement of the judgment denying habeas relief. That is the classic function of a Rule 60(b) motion, and such a motion should be treated within the usual confines of Rule 60(b).

Rodwell, 324 F.3d at 70 (citation omitted); *cf. Lazo v. United States*, 314 F.3d 571, 573 (11th Cir.2002) (vacated panel opinion) (concluding that Lazo's purported Rule 60(b) motion was the "functional equivalent of a successive § 2255 motion"). To further guide the district courts, I would repeat the observation I made in my dissent from the *Mobley* panel:[20]

> one in which the motion's factual predicate deals primarily with some irregularity or procedural defect in the procurement of the judgment denying habeas relief. That is the classic function of a Rule 60(b) motion."); *Dunlap v. Litscher*, 301 F.3d 873, 875 (7th Cir.2002) ("It is only when Rule 60(b) conflicts with AEDPA that it is unavailable to a prisoner.").
>
> The majority today places our court near the middle ground. But rather than adopting a flexible rule that would permit district courts to honor AEDPA's aims without punishing true Rule 60(b) movants, the majority specifies a hard-and-fast exception to its holding that all Rule 60(b) motions are SSHPs: motions to remedy fraud upon the court under Rule 60(b)(3).
>
> The majority is somehow convinced that the only way a habeas petitioner who seeks Rule 60(b) relief will be able to avoid AEDPA's restrictions on SSHPs is by asserting that the district court's judgment was fraudulently obtained. To be sure, "fraud, ... misrepresentation, or other misconduct [perpetrated by the respondent]" is *one* valid ground for seeking relief from a habeas judgment under Rule 60(b) without implicating § 2244's requirements, as many of our sister circuits have recognized. *See Winestock*, 340 F.3d at 207; *Dunlap*, 301 F.3d at 876; *Rodriguez*, 252 F.3d at 199; *Thompson*, 151 F.3d at 921 n. 3. Obviously, such misconduct is not the only reason to doubt the legitimacy of a habeas judgment.

20. I would also reemphasize that district courts should treat Rule 60(b)(6) motions with special caution. Rule 60(b)(6) allows a court to grant relief from a judgment for "any other reason" beyond those specified in Rule 60(b)(1)-(5). *See Klapprott*, 335 U.S. at 614–15, 69 S.Ct. at 390 ("[I]n simple English, the language of the 'other reason' clause, for all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice."). As the Supreme Court has held, "[t]o justify relief under subsection (6), a party must show 'extraordinary circumstances' suggesting that the party is faultless in the delay." *Pioneer Inv. Serv. Co. v. Brunswick Associates Ltd. P'ship*, 507 U.S. 380, 393, 113 S.Ct. 1489, 1497, 123 L.Ed.2d 74 (1993). The amorphousness of this subsection makes it particularly prone to abuse. As I noted in *Mobley*, "[a] district court that uses this 'catch-all' provision to allow a habeas corpus petitioner to obtain review of a new constitutional claim will ... eviscerate the provisions of AEDPA." 306 F.3d at 1102 n. 3 (Tjoflat, J., dissenting).

> [I]f a petitioner[ ] who already has been denied federal habeas corpus relief files a motion that presents new constitutional claims to the district court, this motion should be considered a "second or successive" habeas corpus petition—even if the petitioner calls it a Rule 60(b) motion. Likewise, if the petitioner [br]ought a "second or successive" habeas corpus petition to raise questions about the integrity of a prior habeas corpus proceeding ... then the court should review the filing under the standards for Rule 60(b) motions and not under the strictures of 28 U.S.C. 2244(b)(2).

306 F.3d at 1101–02 (Tjoflat, J., dissenting); *accord Winestock*, 340 F.3d at 207 ("[A] brand-new, free-standing allegation of constitutional error in the underlying criminal judgment will virtually always implicate the rules governing successive applications. Similarly, new legal arguments or proffers of additional evidence will usually signify that the prisoner is not seeking relief available under Rule 60(b) but is instead continuing his collateral attack on his conviction or sentence." (citations omitted)). If the court finds that the motion states a valid ground for relief under Rule 60(b), it may entertain the motion. If it instead determines that the filing is an SSHP parading as a Rule 60(b) motion, then § 2244 applies.[21] In the latter case, the district court may not entertain the SSHP without our authorization. 28 U.S.C. § 2244(b)(3)(A). If the petitioner has not obtained our authorization, the district court must reject his motion for lack of subject matter jurisdiction. *See Winestock*, 340 F.3d at 208–09 (vacating the district court's denial of the petitioner's purported Rule 60(b) motion and remanding with the instruction to dismiss for lack of jurisdiction); *Rodwell*, 324 F.3d at 73 (affirming the district court's dismissal of an SSHP dressed as a Rule 60(b) motion); *Dunlap*, 301 F.3d at 876–77 (holding that the district court erred in failing to recharacterize a Rule 60(b) motion as an SSHP and reversing with the instruction to dismiss for lack of jurisdiction); *United States v. Rich*, 141 F.3d 550, 554 (5th Cir.1998) (affirming the district court's dismissal of the petitioner's filing for lack of jurisdiction).

Although "this test [would not] operate with mathematical precision," *Rodwell*, 324 F.3d at 71, it elevates substance over form and satisfies the independent aims of AEDPA and Rule 60(b). Like the First Circuit, I am "confident that ... the district courts [would] be able to sift wheat from chaff without undue difficulty." *Id.*

III.

Pursuant to 28 U.S.C. § 2253(c)(1),

> Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.[22]

After reducing Rule 60(b)'s scope to claims of fraud, the majority holds that § 2253 requires habeas petitioners to obtain a COA before appealing the denial of Rule 60(b)(3) relief. I cannot ascribe to this holding because § 2253's plain language discloses no such requirement. Neither can I ascribe to the majority's reliance on the decisions in other circuits that might appear to, but do not, support its position.

A.

Courts of appeals have jurisdiction "of appeals from all final decisions of the district courts...." 28 U.S.C. § 1291. A litigant faced with an unfavorable district court judgment may make a timely appeal of that judgment and may also file a Rule 60(b) motion for relief with the district court either before or after filing his appeal. *See Stone v. Immigration and Naturalization Serv.*, 514 U.S. 386, 401, 115 S.Ct. 1537, 1547, 131 L.Ed.2d 465 (1995). "The denial of the [Rule 60(b)] motion is appealable as a separate final order...." *Id.* Thus, an order adjudicating a Rule 60(b) motion, in addition to a final judgment adjudicating the case as a whole, is an appealable, final decision.

Although our appellate jurisdiction extends to all final decisions, § 2253's COA requirement does not. As a textual matter, § 2253 requires a COA to appeal only *one* final order in a habeas corpus proceeding, not all orders. *See* 28 U.S.C. § 2253(c)(1) (providing that the COA requirement applies to "*the* final order" in proceedings attacking state or federal convictions or sentences (emphasis added)).

In habeas cases involving more than one appealable order, such as orders disposing of Rule 60(b) motions or other post-judgment motions, § 2253's requirement of a COA as to the appeal of just *one* final order clearly extends to the petitioner's efforts, if any, to appeal the court's final judgment denying him habeas relief. The district court's judgment on the habeas petition is seemingly the only "final decision" that could deny the petitioner's constitutional challenge to his conviction or sentence. Therefore, that judgment is the only decision that § 2253(c)(2) seems to address; it is the only final order that could serve as the basis for the petitioner's "substantial showing of the denial of a constitutional right[,]" the showing he must make to obtain the COA. In contrast to judgments denying habeas relief, final orders denying a Rule 60(b) motion do not adjudicate a constitutional challenge to the movant's conviction or sentence. They simply state that the district court will not exercise its discretion to set aside the final judgment it entered.[23]

I agree with the majority's statement that the word "the" can sometimes be read in the plural. In certain circumstances, singular terms can be construed in the plural. *See* 1 U.S.C. § 1 ("[U]nless the context indicates otherwise[,] words importing the singular include and apply to several persons, parties, or things...."). "But obviously this rule is not one to be applied except where it is necessary to carry out the evident intent of the statute." *First Nat'l Bank in St. Louis v. Missouri*, 263 U.S. 640, 657, 44 S.Ct. 213, 215, 68 L.Ed. 486 (1924) (interpreting the predecessor rule that "words importing the singular number may extend and be applied to several persons or things"); *see also Toy Mfrs. of America, Inc. v. Consumer*

21. In discussing how a district court should treat true Rule 60(b) motions and SSHPs masquerading as Rule 60(b) motions, I omit reference to what might be termed "mixed" Rule 60(b) motions—motions that are in part true Rule 60(b) motions and in part SSHPs. A district judge should have no difficulty weeding out the SSHP allegations, disposing of them for lack of jurisdiction, and then passing on the merits of the allegations that are actually cognizable under the Rule.

22. The petitioner must first seek a COA from the district court. 11th Cir. R. 22-1(a). If the district court denies a COA, the petitioner may seek one from our court. Fed. R.App. P. 22(b)(1). Furthermore,

> if the district court denies a[COA], and at the time of docketing the appeal in [our court] the [petitioner] has not filed a renewed application for a [COA] in [our court], the application denied by the district court ... shall be construed by [our court] as a renewed application for a [COA].

11th Cir. R. 22-1(c)(2).

23. This point is discussed at length in Part IV, *infra*.

Prods. Safety Comm'n, 630 F.2d 70, 74 (2nd Cir.1980) (holding that 1 U.S.C. § 1 does not apply "except where it is necessary to carry out the evident intent of the statute"). AEDPA evinces no legislative intent to apply the COA requirement to more than one order. Nor does it evince legislative intent to apply the § 2253(c)(2) requirement of a "substantial showing" to an order that does not determine whether the petitioner has suffered the denial of a constitutional right. While AEDPA clearly limits appeals of the denial of habeas relief, there is nothing in the text of the Act that narrows the reach of Rule 60(b) or the independent collateral attacks the Rule authorizes. Thus, interpreting "the" in the plural would be improper in this context, and § 2253 must apply to one final order: the district court's final judgment on the habeas petition.

B.

I respectfully decline to join in the majority's reliance on the decisions of our sister circuits for the proposition that the COA requirement of § 2253 extends to appeals of the denial of Rule 60(b) relief. By and large, the courts, in reaching these decisions, simply assumed that § 2253 applies in the Rule 60(b) context. Moreover, most of these cases involve obvious misuses of the Rule and are therefore inapposite to circumstances involving true Rule 60(b) motions. *See Rutledge v. United States*, 230 F.3d 1041, 1052–53 (7th Cir. 2000) (considering an appeal from the denial of a Rule 60(b) motion based on an ineffective assistance of counsel claim that the petitioner "should have raised . . . in his § 2255 motion"); *Morris v. Horn*, 187 F.3d 333, 343 (3d Cir.1999) ("What [the habeas petitioner] is attempting to raise as a Rule 60(b) motion is in fact what he should have brought as an appeal" from the district court's dismissal of his habeas petition for failure to exhaust state remedies.); *Zeitvogel v. Bowersox*, 103 F.3d 56, 57 (8th Cir.1996) (refusing to grant a COA to review the denial of the petitioner's purported Rule 60(b) motion because the motion merely presented a constitutional claim, ineffective assistance of counsel, that the petitioner had previously raised in a motion for leave to file an SSHP).[24] I suggest that a fair reading of the opinions in these cases indicates that none of the motions at issue was a true Rule 60(b) motion.

Langford v. Day, 134 F.3d 1381, 1382 (9th Cir.1998), also relied on by the majority, remains as a possible outlier. In that case, the petitioner, Langford, was convicted of capital murder by a Montana court and sentenced to death. At the time sentence was imposed, Montana law prescribed hanging or lethal injection as the means of execution. The trial court allowed the petitioner to choose the means of execution, and he chose hanging. In challenging his sentence on direct appeal and on federal habeas corpus, the petitioner unsuccessfully claimed that hanging violated the Eighth Amendment. Prior to the date set for his execution, "the Montana legislature abolished hanging, leaving only lethal injection as a means of execution." *Id.* at 1382. The petitioner thereafter filed a Rule 60(b) motion in the district court, alleging that this change in Montana law authorized the court to revisit its judgment denying his petition for habeas corpus relief. The court denied his motion, and the petitioner filed a notice of appeal.

The court of appeals interpreted its pre-AEDPA precedent, *Lynch v. Blodgett*, 999 F.2d 401, 402–03 (9th Cir.1993), to preclude it from entertaining a petitioner's appeal absent a certificate of probable cause (the COA's pre-AEDPA analog). In the court's view, AEDPA required a COA in all circumstances in which a certificate of probable cause was previously required. Because the petitioner could obtain neither a COA nor a certificate of probable cause, the court did not decide whether AEDPA or pre-AEDPA law applied.[25] In other words, the denial of a meritorious constitutional claim was required in either case, and petitioner failed to show this. *Langford*, 134 F.3d at 1382.

The Ninth Circuit's decision in *Lynch*, the basis for *Langford*'s result, relied on this circuit's decision in *Lindsey v. Thigpen*, 875 F.2d 1509, 1512 (11th Cir.1989) (per curiam). *Lindsey*, however, is inapposite to *Langford* and to the three cases we decide today. First, in *Lindsey*, a pre-AEDPA case, we had no opportunity to consider AEDPA's SSHP restrictions. Second, the petitioner in *Lindsey* did not file a true Rule 60(b) motion, even though he labeled it as such. The petitioner alleged in his motion, which challenged the constitutionality of his death sentence, that (1) "the district court should reconsider his claim regarding the 'especially heinous, atrocious or cruel' aggravating factor in light of [*Maynard v.*] *Cartwright* [, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988)]"; and (2) "the trial judge's override of the jury's recommendation of life imprisonment violated the sixth amendment...." *Lindsey*, 875 F.2d at 1511. Because his filing was really an SSHP in Rule 60(b)'s clothing, the petitioner would today have to obtain leave of this court under § 2244(b)(3) before presenting the SSHP to the district court.[26]

In *Langford*, 134 F.3d at 1382, by contrast, at least in the Ninth Circuit's view, the petitioner's so-called Rule 60(b) motion "sought relief from a judgment of the district court denying Langford's petition for habeas corpus...."[27] It did not assert constitutional claims attacking his underlying conviction or sentence. Consequently, his motion was not an SSHP, and no COA should have been required to appeal its denial. Ultimately, the *Langford* court made the same error our panel made in *Mobley*: it failed to comprehend that *Lindsey* and cases like it are limited to misuses of Rule 60(b).

IV.

Before suggesting the dispositions the court should make in these consolidated

24. The majority also relies on *Kellogg v. Strack*, 269 F.3d 100 (per curiam) (2d Cir. 2001). The grounds for the petitioner's Rule 60(b) motion in that case are unclear from the court's opinion.

25. While *Langford* is not entirely clear on this issue, I assume that AEDPA's effective date fell after the petitioner filed his motion but before he filed his notice of appeal. The Supreme Court had not settled the question whether AEDPA's COA requirement applied in this circumstance until after 1998, the year of the *Langford* decision. *See Slack v. McDaniel*, 529 U.S. 473, 481, 120 S.Ct. 1595, 1602, 146 L.Ed.2d 542 (2000) (holding that "§ 2253 applies to appellate proceedings initiated post-AEDPA[,]" even when the underlying habeas proceeding was initiated a district court pre-AEDPA).

26. This conclusion is not, as the majority suggests, in tension with my observation that § 2253 requires a COA only to appeal the district court's judgment denying habeas relief. *See* Maj. op. at 1265–1266 nn. 3–4. An appeal of a district court's dismissal of an SSHP (clothed as a Rule 60(b) motion) for lack of § 2244 leave to proceed requires no COA because it involves only a preliminary jurisdictional inquiry: whether the district court was correct in concluding that it did not have a true Rule 60(b) motion, which it should entertain, before it. Of course, if a petitioner filed an SSHP in the district court after obtaining § 2244 leave, the district court's denial of the SSHP would be "the final order in a habeas corpus proceeding" under § 2253(c)(1). The petitioner would therefore need a COA to appeal the district court's denial.

27. We rely on the Ninth Circuit's view as to the content of the petitioner's claims. Obviously, the record of that case is not before us.

BEST AVAILABLE COPY

appeals, I think it useful to discuss the practical implications of the majority holdings. To recap, the majority holds, first, that (with the exception of a motion filed under Rule 60(b)(3)) to obtain relief under Rule 60(b), a petitioner must apply to this court for leave to file his motion. In doing so, he must satisfy the requirements of § 2244(b)(2), meaning that:

> (A) . . . the claim [set forth in his motion] relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [him] guilty of the underlying offense.

Thus, the majority separates Rule 60(b) motions into two groups: first, Rule 60(b)(3) motions, which are to be presented to the district court; and second, Rule 60(b)(1), (2), and (4)-(6) motions, which the majority treats as SSHPs that must be presented to this court as § 2244(b)(2) applications for leave to seek relief in the district court. The majority next holds that before the petitioner can appeal the district court's denial of his Rule 60(b)(3) motion, he must obtain a COA. This means that his application for a COA must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Given these holdings, I now illustrate what Rule 60(b) litigation will look like from now on.

With respect to the Rule 60(b)(3) motions, the majority opinion does not come into play until the district court has denied relief and the petitioner seeks to appeal the denial. The petitioner cannot appeal unless and until he obtains a COA by making the requisite § 2253(c)(2) "substantial showing of the denial of a constitutional right." With respect to motions seeking relief under Rule 60(b)(1), (2), and (4)-(6), the majority opinion comes immediately into play. The petitioner must apply to this court for leave to proceed in the district court; to obtain such leave, he must satisfy the requirements of § 2244(b)(2)(A), (B), quoted above. In short, whether the petitioner is seeking relief on these Rule 60(b) grounds or under Rule 60(b)(3), his motion will have to convince the court that he is presenting a constitutional challenge to his underlying conviction or sentence.

In examining his motion for a constitutional claim, the court will find none. Why? Because the petitioner has filed a true Rule 60(b) motion, and such motions do not contain constitutional claims. *See supra* Part II.B. The petitioner might obtain a COA in the 60(b)(3) context only if the court—the district court or this court—looks beyond the Rule 60(b) motion to his habeas petition to determine whether the petitioner there presented a constitutional claim that satisfies § 2253(c)(2)'s "substantial showing" requirement. The petitioner will never prevail on a motion under Rule 60(b)(1), (2), (4), (5), or (6) because the petitioner's application to this court for leave [28] to file such a motion will not satisfy either of § 2244(b)(2)'s alternative requirements.[29] Why? Because the text of those requirements, taken literally, precludes the court from looking beyond the Rule 60(b) motion by limiting the court to a consideration of "claim[s] presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application . . . ."

The bottom line of this discussion is twofold. First, the majority completely eviscerates Rule 60(b)(1), (2), and (4)-(6). As they apply to habeas petitioners, these provisions are now off the books in the Eleventh Circuit.[30] Second, the majority does away with a significant part of a petitioner's right to prosecute a true Rule 60(b)(3) motion. The petitioner may file the motion, but if the district court denies it, whether he will obtain a COA and thus be able to appeal the denial is problematic.[31]

I further explain this second consequence of the majority opinion by examining four hypothetical scenarios. These scenarios consider how a court's decision

28. Suppose the petitioner does not seek § 2244(b)(3)(A) leave of this court to file in the district court a Rule 60(b) motion under subparts (1), (2), (4), (5), or (6) but, instead, files the motion in the district court. The district court denies the motion and the petitioner files a notice of appeal, invoking our 28 U.S.C. § 1291 jurisdiction. Would the majority require the issuance of a COA as a condition precedent to entertaining the appeal, or would the majority permit the appeal to proceed without a COA? I do not find an explicit answer to this question in the majority opinion. The majority's disposition of the *Gonzalez* case, however, implies that a COA must be obtained. Gonzalez sought relief from a habeas judgment in the district court on a Rule 60(b)(6) ground, namely that a subsequent decision of the Supreme Court cast doubt on that habeas judgment. The district court denied his Rule 60(b) motion, and Gonzalez filed a notice of appeal. In disposing of this case, the majority now grants a COA and then affirms the district court because the Rule 60(b) motion did not claim fraud, which is the only Rule 60(b) claim that remains available to collaterally attack the denial of a habeas corpus petition. I question the wisdom of having this court expend its resources deciding to issue a COA and then passing on the merits of Gonzalez's appeal. Instead of taking these steps, it would be more efficient simply to dismiss the appeal on the ground that a Rule 60(b) motion is no longer available. Had the district court not granted Gonzalez leave to appeal IFP and he applied to this court for such leave, this court could have denied it on the ground that the appeal was frivolous.

29. Nor could a true Rule 60(b) motion satisfy the comparable criteria of § 2255, which applies to federal prisoners. *See supra* note 5. As true Rule 60(b) motions filed in a § 2255 proceeding would challenge only the § 2255 judgment, no such motion could assert that the prisoner's conviction or sentence was imposed "imposed in violation of the Constitution or laws of the United States."

30. In writing Rule 60(b)(1), (2), (4)-(6) off the books, what the majority seems to be holding is that Congress, in enacting AEDPA, repealed these provisions by implication. But "[i]n the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Morton v. Mancari*, 417 U.S. 535, 550, 94 S.Ct. 2474, 2482, 41 L.Ed.2d 290 (1974). Tellingly, Congress was not blind to the effects AEDPA would have on the rules of procedure; for example, focusing on the relevant Federal Rules of Appellate Procedure, Congress amended Federal Rule of Appellate Procedure 22. *See* AEDPA of 1996, Pub.L. No. 104–132, 110 Stat. 1214 § 103. Congress did nothing, however, to Rule 60(b); rather, it simply let the Rule stand as is. In allowing Rule 60(b) to stand while limiting the availability of habeas relief under AEDPA, Congress did not create an "irreconcilable" situation. There is nothing irreconcilable about cutting down on SSHPs and at the same time permitting the district courts to set aside a habeas judgment that should not stand under Rule 60(b).

31. I note here that the petitioner's respondent (the State) does not have to obtain a COA as a condition precedent to appealing a district court's order setting aside the final order (that denied the petitioner habeas relief). AEDPA extends the COA requirement only to petitioners, not to respondents. Section 103 of AEDPA expressly amended the Federal Rules of Appellate Procedure to guarantee this result. *See* AEDPA of 1996, Pub.L. No. 104–132, 110 Stat. 1214 § 103; Fed. R.App. P. 22(b)(3) ("A certificate of appealability is not required when a state or its representative or the United States or its representative appeals.").

whether to grant a COA as to a judgment denying a habeas petition would affect the decision whether to grant a COA as to an order denying a Rule 60(b)(3) motion. Before I begin, though, two observations must be made about the assumptions underlying the scenarios.

First, a Rule 60(b) motion that states a new constitutional claim is an SSHP, and the district court, lacking jurisdiction to entertain it, must reject it on that ground.[32] *See supra* Part II.D. Thus, in discussing the implications of the majority's holdings, I refer to true Rule 60(b) motions (which by definition do not state a constitutional claim).

Second, because a true Rule 60(b)(3) motion does not contain a constitutional challenge to the petitioner's state court conviction or sentence, the question becomes: where would the COA court look to determine whether the petitioner has made "a substantial showing of the denial of a constitutional right?" The majority's answer to this question is that the court—the district court or this court—must look somewhere else. In deciding these appeals, the majority chooses to examine two sources. In *Lazo*, for example, the majority examines the allegations of the petitioner's motion, which was brought under "Rule 60(b)(4) and/or (6)." The motion was an SSHP because it alleged the denial of constitutional rights. Finding no merit in the constitutional claims the motion presented, the majority denies a COA. In *Gonzalez*, however, the majority faces a true Rule 60(b)(6) motion. Because the Rule 60(b) motion does not contain constitutional claims, the majority looks not to the motion but to the allegations of the petitioner's habeas petition for evidence of the denial of a constitutional right. The majority concludes that such evidence satisfies the constitutional-claim element of § 2253(c)(2) because the majority "cannot say that Gonzalez's claim is not debatable among jurists of reason." Maj. op. at 1268. Having so concluded, the majority grants a COA and then affirms the district court's decision. Finally, in *Mobley*, the majority looks, as in *Lazo*, to the allegations of the Rule 60(b) motion, concludes that such allegations satisfy § 2253(c)(2)'s "substantial showing," grants a COA, and then affirms the district court's decision.

I now turn to the four hypothetical scenarios, each involving a true Rule 60(b)(3) motion, to illustrate how the majority's holding—that the petitioner must obtain a COA in order to appeal the denial of his motion—will play out.

In the first scenario, the petitioner obtained a COA to appeal the denial of habeas relief, and we affirmed on appeal. The petitioner then moved the district court pursuant to Rule 60(b)(3) to set aside its decision on the ground that is decision was obtained through fraud. The district court denied the motion. Can the petitioner obtain a COA to appeal? Our earlier affirmance of the district court's rejection of the petitioner's constitutional claims should prompt the district court and this court to say that the petitioner cannot satisfy § 2253(c)(2)'s requirement that he make a "substantial showing of the denial of a constitutional right." If a COA were to issue, it would cast doubt on the correctness of our earlier decision affirming the district court's denial of habeas relief; hence, issuing a COA is not in the cards. *Result: In this situation, the petitioner never obtains a COA to appeal.*

In the second scenario, the petitioner sought to appeal the district court's order denying habeas relief but failed to obtain a COA. The petitioner thereafter moved the district court to set aside its decision under Rule 60(b)(3), and the court denied the motion. Can a COA issue so that the petitioner can appeal the ruling? Yes, but in issuing the COA, the court—the district court or this court—would be casting doubt on the correctness of the earlier decision denying the COA. Absent a sound reason for effectively overruling the prior COA denial, I suggest that a COA would not issue. *Result: In this situation, the petitioner never obtains a COA.*

In the third scenario, this court granted a COA, and while the petitioner's appeal was pending, the petitioner moved the district court to set aside its decision under Rule 60(b)(3).[33] The court denied the motion. Is a COA likely to issue? Since the district court or this court previously found that the petitioner had made a § 2253(c)(2) "substantial showing of the denial of a constitutional right" and the appeal is still pending, I suggest that a COA would issue and the petitioner's appeal of the Rule 60(b)(3) ruling would proceed.[34] *Result: In this situation, the petitioner obtains a COA.*

In the fourth scenario, the district court denied habeas relief, and the petitioner did not appeal. After the thirty-day appeal period expired, the petitioner filed a Rule 60(b)(3) motion. The court denied the motion, and the petitioner applied for a COA. He obtains a COA if the allegations of his habeas petition satisfy § 2253(c)(2)'s "substantial showing" criterion. *Result: In this situation, the petitioner might obtain a COA.*

In sum, these four scenarios indicate that under the majority's § 2253(c)(2) holding, the merit of a petitioner's Rule 60(b)(3) motion will have no bearing on the court's decision on whether to grant a COA. Under § 2253(c)(2), the only question for the COA court is whether the petitioner has "made a substantial showing of the denial of a constitutional right." All that a true Rule 60(b)(3) motion alleges is that the petitioner's adversary obtained a final order through fraud from the district court. It does not address the sufficiency of the petitioner's claim that his conviction or sentence was obtained in violation of the Constitution.

V.

Having expressed my disagreement with the majority's principal holdings, I turn to the appeals before us, *Lazo*, *Gonzalez*, and *Mobley*.

A.

On January 2, 2002, after Emile Lazo had lost his first § 2255 motion and failed to obtain a COA to appeal, he "filed a motion and brief, which he labeled as being pursuant to Fed.R.Crim.P. 12(b)(2) and Fed.R.Civ.P. 60(b)(4), (6), seeking relief from the district court's previous denial of his § 2255 motion." *Lazo v. United States*, 314 F.3d 571, 572 (11th Cir.2002) (vacated panel opinion). In this motion, Lazo claimed that

> his conviction is void because the district court lacked subject matter jurisdiction to hear his case and impose a sentence

32. To obtain relief in the district court, therefore, the petitioner must first obtain leave of this court pursuant to § 2244(b)(3)(A).

33. The district court has jurisdiction to consider the Rule 60(b)(3) motion even though the petitioner's appeal of the denial of habeas relief is pending. *Stone v. Immigration and Naturalization Serv.*, 514 U.S. 386, 401, 115 S.Ct. 1537, 1547, 131 L.Ed.2d 465 (1995) ("Either before or after filing his appeal, the litigant may also file a Rule 60(b) motion for relief with the district court. The denial of the motion is appealable as a separate final order, and if the original appeal is still pending it would seem that the court of appeals can consolidate the proceedings.").

34. This scenario is not likely to occur. In fact, in over 28 years on this court and its predecessor Fifth Circuit, I have never encountered it.

> because the indictment was insufficient[,] the grand jury failed to allege an interference with interstate and/or foreign commerce under 21 U.S.C. § 801, failed to give him "notice" as to the penalty against which he must defend in violation of the Sixth Amendment, and failed to give jurisdiction to the sentencing court to impose his sentence under 21 U.S.C. § 841(b)(1)(A) by failing to establish an interference with interstate commerce.

Id. at 573. On March 1, 2002, the district court denied the motion without explanation—and without indicating whether it was treating Lazo's filing as a true Rule 60(b) motion or as an SSHP. On April 30, 2002, Lazo filed a notice of appeal[35] and applications for leave to proceed *in forma pauperis* ("IFP") and for a COA. The court granted his application for IFP but denied a COA.

We thereafter noted probable jurisdiction and the appeal was briefed. Addressing the threshold question the appeal posed—whether the motion Lazo filed in the district court should be treated as a second or successive motion under 28 U.S.C. § 2255—a panel of this court answered in the affirmative. In the panel's view, Lazo's motion was "really a successive § 2255 motion in Rule 60(b)'s clothing," since it merely "[made] new arguments attacking the validity of [the] sentence," and did not articulate a valid ground of relief under Rule 60(b). *Id.* at 573. Because Lazo had not obtained leave to file a successive petition under 28 U.S.C. § 2244(b)(3)(A),[36] the panel recognized that the district court should have dismissed Lazo's purported Rule 60(b) motion for lack of jurisdiction. The panel nonetheless determined that "the district court's denial of [Lazo's] successive § 2255 motion [was] a 'final order' in a § 2255 proceeding,'" and that Lazo needed a COA to appeal that denial. *Id.* at 575. The panel then construed Lazo's notice of appeal as a motion for a COA and denied it. *Id.* at 574–75.[37]

I agree with the panel that Lazo's Rule 60(b) motion was really an SSHP, and that the district court lacked jurisdiction to consider it. Thus, rather than "denying" the motion without explanation—which implied that the court was adjudicating the motion on its merits—the district court should have dismissed it for lack of jurisdiction. The panel, in turn, should have affirmed the district court's judgment on the ground that the district court lacked jurisdiction to entertain Lazo's motion. The majority should also affirm on that ground. Instead, the majority searches for a

35. Lazo had 60 days from the date of the district court's decision to file a notice of appeal. *See* Fed. R.App. P. 4(a)(1)(B).

36. Section 2255 states that

> [a] second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—
>
> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

The reference to § 2244 is to § 2244(b)(3)(A), which states:

> Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

37. Relying upon *Slack v. McDaniel*, 529 U.S. 473, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000), the panel determined that a COA could not issue because of a "plain procedural bar," i.e., Lazo's failure to seek leave from our court to file a successive petition. *Lazo*, 314 F.3d at 574.

§ 2253(c)(2) showing of "a denial of a constitutional right" and denies a COA, which means that Lazo cannot prosecute his appeal. By operation of law, therefore, the district court's decision stands.

B.

On September 9, 1998, the district court entered a final order dismissing Aurelio Gonzalez's § 2254 petition as time-barred under 28 U.S.C. § 2244(d)(1) because the petition had not been filed within AEDPA's one-year limitations period. *Gonzalez v. Sec. for the Dep't of Corr.*, 317 F.3d 1308, 1310 (11th Cir.2003). Gonzalez filed a timely notice of appeal and applied for a COA. The district court denied his application; we did likewise on April 6, 2000. *Id.* at 1310. The consequence of our denial of a COA for Gonzalez was that the district court's final order stood as if we had affirmed it on appeal.

On August 2, 2001, Gonzalez, proceeding *pro se*, "filed a Rule 60(b) motion asking the district court to reconsider its ... order denying him habeas relief on statute of limitations grounds in light of the intervening Supreme Court decision in *Artuz v. Bennett*, 531 U.S. 4, 121 S.Ct. 361, 148 L.Ed.2d 213 (2000), which interpreted the 'properly filed' clause of the tolling provision contained in § 2244(d)(2)." *Gonzalez*, 317 F.3d at 1310. As I read Gonzalez's somewhat disjointed handwritten motion, he contends that had *Artuz* been decided before the district court ruled on the timeliness of his habeas petition, the court would not have held it time barred. The district court denied Gonzalez's motion on March 5, 2002, because the "[p]etitioner already ha[d] taken an appeal to the Eleventh Circuit. Accordingly, [the court] no longer ha[d] jurisdiction over his claims." Gonzalez filed a timely notice of appeal, and applications to proceed IFP and for a COA. The district court refused to issue a COA, but it granted Gonzalez leave to appeal IFP.

Gonzalez then applied to this court for a COA. A panel of the court acknowledged that Gonzalez's motion is a true Rule 60(b) motion, filed apparently under Rule 60(b)(6),[38] but, as the majority does today, denied his application. *Id.* at 1311–13. The panel did so "[f]or two independently adequate reasons." *Id.* First, it held that under our decision in *Mobley v. Head*, 306 F.3d 1096 (11th Cir.2002) (from which I dissented), "all Rule 60(b) motions in habeas cases are to be treated as second or successive petitions." *Gonzalez*, 317 F.3d at 1312. Second and alternatively, the panel found that the "extraordinary circumstances" that *Ritter v. Smith*, 811 F.2d 1398 (11th Cir.1987), requires as a condition precedent to granting Rule 60(b)(6) relief were absent. *Id.* at 1312–13. According to the panel, Gonzalez had not shown that

> (1) the erroneous judgment had not been executed; (2) there was only minimal delay between the entry of the judgment the motion sought to set aside and the filing of the motion; and (3) there was a close connection between the case and the case that gave rise to the intervening decision upon which the motion was based.

Id. at 1313.

We review district court denials of Rule 60(b) motions for abuse of discretion. *Davis v. Fla. Power & Light Co.*, 205 F.3d 1301, 1304 n. 4 (11th Cir.2000). Applying that standard, the panel refused to issue a COA because it "[did] not find it debatable among jurists of reason whether the denial of Gonzalez's Rule 60(b) motion was an abuse of discretion." *Gonzalez*, 317 F.3d at at 1312. The panel so held even though the district court had not entertained the

38. Rule 60(b)(6) authorizes a district court to vacate its final judgment for "any other reason justifying relief from the operation of the judgment."

motion because it mistakenly thought that it lacked jurisdiction to hear it.

I disagree with the panel's decision, notwithstanding that it has been vacated by the order taking this case en banc. I disagree because it is hornbook law that a district court abuses its discretion when it misapplies the law in reaching its decision. Here, the district court misapplied the law; it erroneously denied the motion because it thought it lacked jurisdiction to hear it. I would therefore vacate the district court's ruling and remand the case with the instruction that the court consider the motion on its merits.

The majority, however, issues a COA [39] and affirms the district court's decision as if the district court had actually entertained Gonzalez's motion and ruled on its merits:

> Gonzalez does not contend that there was any clerical error in the final judgment denying him federal habeas relief, or that fraud was used to obtain that judgment. His sole contention is that the [district court's] judgment [denying habeas relief] was wrong, because the subsequently released [Supreme Court] decision in [*Artuz*] shows that the "properly filed" language of § 2244(d)(2) was misinterpreted to deny him relief. He is attacking the merits of that decision—the term "merits" referring to the correctness of the decision itself even though the ground of this particular decision was the statute of limitations, an affirmative defense.
>
> Gonzalez's Rule 60(b) motion is an attempt to relitigate a claim that has already been presented in a prior application [for a COA] and rejected, which means it must be dismissed under § 2244(b)(1).... An error of law, even one demonstrated by an intervening decision, does not fit either of the extra-statutory exceptions to the rule we have borrowed from *Calderon* and announced today.

Maj. op. at 1281.

What the majority overlooks is that Gonzalez's Rule 60(b) motion seeks, in legal effect, to invoke an exception to the mandate rule.[40] As I state above, the legal effect of our denial of a COA to review the district court's final decision denying habeas relief is that the district court's final decision stands as if affirmed by this court. That is, for the purposes of the mandate rule, the order we entered denying a COA was the functional equivalent of a mandate from this court affirming the district court's decision.[41]

39. In deciding whether to issue Gonzalez a COA, the majority looks to his habeas petition (which the district court had denied) to see whether he has made the § 2253(c)(2) substantial showing of the denial of a constitutional right. According to the majority, the petition alleged that Gonzalez's "guilty plea was unintelligent, unknowing, and involuntary based on specific evidence he has proffered." Maj. op. at 1268. The majority concludes that Gonzalez satisfies § 2253(c)(2)'s requirement because it "cannot say that Gonzalez's claim is not debatable among jurists of reason." *Id.* I submit that looking beyond Gonzalez's Rule 60(b) motion—to the habeas petition—for evidence of the denial of a constitutional right is contrary to this court's statement in *Gulf Coast Fans, Inc. v. Midwest Elecs. Imp., Inc.*, 740 F.2d 1499, 1507 (11th Cir.1984), that our review of a district court's disposition of a Rule 60(b) motion is "restricted to those issues raised in [the movant's] Rule 60(b) motion."

40. The mandate rule and the law of the case doctrine are for our purposes interchangeable. *See Piambino v. Bailey*, 757 F.2d 1112, 1120 (11th Cir.1985) ("The 'mandate rule,' as it is known, is nothing more than a specific application of the 'law of the case' doctrine."). Thus, in referring to the mandate rule, I am also referring to the law of the case doctrine.

41. Another way of looking at this situation is to treat the district court's final decision denying Gonzalez's habeas petition as if Gonzalez had not appealed the decision.

The district court denied relief on the ground that AEDPA's one-year limitations period barred Gonzalez's § 2254 petition. The mandate rule precludes Gonzalez from asking the district court to reconsider its decision unless he can base his request on one of the exceptions to the rule:

> The "mandate rule," as it is known, is nothing more than a specific application of the "law of the case" doctrine. This doctrine stands for the proposition that an appellate decision on an issue must be followed in all subsequent trial court proceedings unless the presentation of new evidence or an intervening change in the controlling law dictates a different result, or the appellate decision is clearly erroneous and, if implemented, would work a manifest injustice.

Piambino v. Bailey, 757 F.2d 1112, 1120 (11th Cir.1985) (citations omitted). What Gonzalez's Rule 60(b)(6) motion alleges, in so many words, is that "an intervening change in the controlling law dictates a different result." I suggest that Rule 60(b) is the perfect vehicle for invoking the intervening-change-in-the-law exception to the mandate rule.[42] In fact, I can think of no other procedural rule that is as tailor made for this situation as Rule 60(b)(6).

In sum, I disagree with the majority's decision that a COA is required to review the district court's refusal to entertain Gonzalez's motion. I also dissent from its disposition, which is that the district court's ruling stands unreviewable. The message the majority is sending to the district judges of this circuit is that they can deny with impunity a Rule 60(b) motion. Can it be that the framers of Rule 60(b) and the rules governing habeas petitions and the Congress that enacted them meant to say that a district court decision not to entertain a petitioner's true Rule 60(b)(6) motion is unreviewable?[43] I think not.

C.

In *Mobley*, the majority grants a COA, reviews the petitioner's collateral motion as if he had filed it under Rule 60(b)(3), finds no merit in the motion, and affirms the district court, which denied the motion because it felt bound by *Felker v. Turpin*, 101 F.3d 657 (11th Cir.1996).[44] I disagree with the majority's holding that a Rule 60(b)(3) decision cannot be appealed absent a COA. I agree, however, with the majority—for the reasons stated in my dissent to the panel's opinion, *Mobley*, 306 F.3d at 1097, which the majority appears to adopt—that Mobley's motion fails to

42. The majority misapprehends this point to mean that any motion asserting an intervening change in the law is a true Rule 60(b) motion if filed as such. As I have explained, § 2244(b)(2)(A) applies to a collateral attack on a habeas petitioner's sentence or conviction, even if that attack rests upon a change in the law. Rule 60(b), on the other hand, should apply free of AEDPA's limitations when a petitioner attacks the integrity of a district court's habeas judgment. As the panel correctly understood, Gonzalez's motion is a true Rule 60(b) motion, not because it asserts a change in the law, but because it

> "attacks the prior federal court habeas order denying relief from the state court judgment of conviction and sentence, instead of attacking the underlying conviction and sentence judgment itself...." *Gonzalez*, 317 F.3d at 1311.

43. Had the district court granted Gonzalez the relief he seeks, the State could have appealed the decision without obtaining a COA. *See supra* note 31.

44. The district court read *Felker* as requiring the district courts of this circuit to treat all Rule 60(b) motions as SSHPs. The majority effectively limits this interpretation of *Felker*'s holding by omitting Rule 60(b)(3) motions from mandatory SSHP treatment.

state a case under Rule 60(b)(3).[45] I therefore concur in the majority's decision affirming the district court's judgment.[46]

BARKETT, Circuit Judge, specially concurring in part and dissenting in part, in which WILSON, Circuit Judge, joins:

I agree completely with Judge Tjoflat's thorough opinion with the exception of his resolution of Mobley's claim. I agree with Judge Tjoflat that the district court denied Mobley's motion on the basis of an improper interpretation of *Felker v. Turpin*, 101 F.3d 657 (11th Cir.1996). I do not agree, however, that we should nonetheless affirm the court's denial of Mobley's motion because it fails to state a case under Rule 60(b)(3). This Court reviews a denial of a 60(b) motion for abuse of discretion. *See Booker v. Singletary*, 90 F.3d 440, 442 (11th Cir.1996). Under that standard, where the district court bases its decision on an incorrect interpretation of the law, we are to remand for further proceedings rather than exercise our discretion by affirming the court's denial on other grounds.[1] I do not agree that Mobley fails to state a claim under Rule 60(b)(3). Mobley argues in his motion that recently discovered evidence indicates that the district court's judgment denying his prior habeas petition rests on a defective foundation because the court relied upon facts (regarding district attorney Fuller's prior testimony) that the State knew or should have known were false. In my view, Mobley clearly alleges that although Fuller's misleading testimony was given in state court, the State's actions regarding Fuller's testimony in federal habeas court created infirmities in that proceeding in addition to the state proceedings. Furthermore, Mobley's motion could be construed to also raise claims under 60(b)(2) ("newly discovered evidence") or 60(b)(6) ("any other reason justifying relief from the operation of the judgment"). Thus, Mobley's claim should be remanded to the district court for resolution on the merits.

45. I read the majority as perhaps reaching alternative holdings: (1) if reasonable jurists could construe Mobley's motion as having been filed under Rule 60(b)(3), the motion is meritless; (2) if reasonable jurists could construe Mobley's motion as alleging a new constitutional claim, it is an SSHP and fails to meet the criteria of § 2244(b)(2).

46. I also concur in the court's decision to deny Mobley's motion to recall the mandate in *Mobley v. Head*, No. 00-13980, and Mobley's motion to stay his execution.

1. As stated in *Collins v. Seaboard C.R. Co.*:
> A discretionary decision that falls within permitted bounds, but is based on false premises, raises the question on review as to whether the trial court would have come to the same conclusion using proper premises. That it could have does not satisfy the inquiry as to whether it would have reached the same result. The affirmance of a discretionary decision that is based on an improper view of the facts or the law merely reflects the appellate court's exercise of discretion that rightfully belongs to the trial court. The proper role of appellate review permits a remand for further proceedings when a discretionary decision has been made on false premises.

Id., 681 F.2d 1333, 1335 (11th Cir.1982).

A-2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

AURELIO O. GONZALEZ,
Petitioner,

V.

HARRY K. SINGLETARY,
Respondents.

CASE NO: 97-1935-CIV-
DISTRICT JUDGE UNGARO-BENAGES
MAGISTRATE JUDGE SORRENTINO.

FILED by D.C.
01 AUG -2 AM 11:12
CLERK U.S. DIST. CT.
S.D. OF FLA. MIA.

RULE 60(b) MOTION TO AMEND OR ALTER JUDGEMENT

Aurelio O. Gonzalez, Petitioner, pro-se, pursuant to Federal Rule of Civil Judicial Procedure 60(b)(6), and Ortiz v. Bennett, 121 S.Ct. 361 (2000), accord Delancy v. Florida Department of Corrections, 14 Fla. L. Weekly Fed C 542 (11th Cir. April 6, 2001), respectfully moves this Honorable Court to alter or amend its Judgement and order entered September 9, 1998, in the above-styled cause and, in support, shows:

STATEMENT OF THE CASE

1. On December 8, 1982, Petitioner entered a guilty plea for a sentence of 99 years.

2. On August 8, 1994, Petitioner filed his first motion for postconviction relief in the state trial court.

3. On September 17, 1994, the Honorable Michael B. Chavies, Eleventh Judicial Circuit Court judge, denied Petitioner's Rule 3.850 motion for postconviction relief.

4. On February 8, 1995, the appellate court affirmed the denial of Petitioner's motion without opinion. Gonzalez v. State, 649 So. 2d. 870 (Fla. 3rd. DCA 1995.)

5. On November 25, 1996, Petitioner filed a second motion for postconviction relief in the state trial court.

6. On June 17, 1997, Petitioner filed a Petition for Writ of Habeas Corpus in the United States District Court Southern District, Florida.

7. On September 3, 1997, Respondent filed its response invoking the statute of Limitation., 28 U.S.C. § 2244(d)(1996.)

8. On October 1, 1997, Petitioner filed a response to Respondent's response and motion to amend his petition.

9. On November 12, 1997, Petitioner filed his amended petition.

10. On July 16, 1998, the Magistrate judge Sorrentino issued a report and recommendation recommending that the case be dismissed as the petition was time barred.

11. On July 29, 1998, Petitioner filed objection to the report.

12. On August 14, 1998, the Magistrate judge Sorrentino issued recommending that the case be dismissed as the petition was time barred.

13. On September 3, 1998, the District Court judge Ursula Ungaro-Benages, Southern District, Florida issued an order dismissing the petition as time barred, closing the case.

14. On September 21, 1998, Petitioner filed a Notice of Appeal with a C.O.A. under 2254 Habeas Corpus proceeding Rule 22(b) in the Southern District Court.

15. On October. 19. 1998, the Southern District judge Uursula Ungaro-Benages filed a order "granting" the Petitioner's motion for Certificate of Appealability.

16. On November 3, 1998, the Southern District Court judge Uesula Ungaro-Benages filed a order allowing the Petitioner to proceed in forma pauperis on appeal.

17. On January 26, 1999, the Eleventh Circuit Court of Appeal filed a memorandum advising the Petitioner to fill out a brief of appeals.

18. On March 8, 1999, Petitioner filed his first INITIAL BRIEF OF APPELLANT in the Eleventh Circuit Court of Appeals.

19. On April 6, 1999, a "BRIEF OF APPELLEE" was filed by the Attorney General Robert A Butterworth in response to the Petitioner/Appellant's brief.

20. On September 28, 1999, the Petitioner/Appellant filed a motion to supplement the record on appeal.

21. On October 28, 1999, the United State Circuit judge denied the Petitioner/Appellant's motion to supplement the record on appeal and dismissed the Petitioner/Appellant's C.O.A. without prejudice. remanding the application for C.O.A. to the Southern District Court for determination of which issues merit appeal under the amended requirements of 28 U.S.C. § 2253 (C.)

22. On November 3, 1999, Petitioner filed his second Certificate of Appealability in the Southern District Court.

23. On December 6, 1999, Petitioner filed a motion for the Appointment of Counsel for Appeal.

24. On December 10, 1999, the Southern District Court judge Uesula Ungaro-Benages denied Petitioner/Appellant's C.O.A because the Petitioner/Appellant failed to make a substancial showing of the denial of Constitutional Rights. 28 U.S.C. § 2253 (C) (2.)

25. On January 6, 2000, Petitioner filed his second Notice of Appeal to the Southern District Court.

26. On January 13, 2000, Petitioner filed his second BRIEF OF APPELLANT to the Southern District Court.

27. On January 21, 2000, the Southern District Court transmitted the Petitioner's Notice of Appeal and Brief of Appellant to the Eleventh Circuit Court of Appeals.

28. On January 26, 2000, a response was filed by the Eleventh Circuit Court of Appeals regarding to a C.O.A. will be issued in the appeals court.

29. On January 28, 2000, the Eleventh Circuit Court of Appeal returned Petitioner's brief of appellant "dismissed" by a court order on October 28, 1999.

30. On February 11, 2000, the Southern District Court granted Petitioner's motion for permission to appeal in Forma Pauperis.

31. On April 6, 2000, the Eleventh Circuit Court of Appeals denied the Petitioner/Appellant C.O.A. basing that the appellant failed to make a substancial showing of the denial of Constitutional Rights. 28 U.S.C. § 2253(C)(2).

32. On April 18, 2000, Petitioner filed a Petition for

Rehearing to the Eleventh Circuit Court of Appeals.

33. On April 26, 2000, Petitioner's Petition for Rehearing was returned "unfiled" as the appeal was dismissed by this court's order of October 28, 1999, stating the appeal was closed.

34. Based on the recent ruling in Artuz v. Bennett, 121 S.Ct. 361 (2000), Petitioner files this Federal Civil Procedure Rule 60 (b)(5), (6).

ARGUMENT

THE DISTRICT COURT'S ORDER OF DISMISSAL OF PETITION FOR WRIT OF HABEAS CORPUS AS TIME-BARRED SHOULD BE VACATED PURSUANT TO THE RECENT DECISION IN Artuz v. Bennett 121 S.Ct. 361 (2000), AND Delaney v. Fla. Department of Correction, Michael Moore, Sec., 26 FLA. L. WEEKLY D 592 (11th Cir. (S.D. FLA.) APRIL 6, 2001.)

35. The District Court Judge dismissed the petition based on the Magistrate Judge's recommendation that the application for writ of habeas corpus was not properly file and, thus, was time-barred pursuant to the AEDPA.

36. The Magistrate Judge's recommendation relied upon the state court's denial of Petitioner's second Rule 3.850 Motion for Postconviction Relief and subsequent state appellate courts affirmance of the denial. Because of the state court's denial,

the Magistrate Judge was split found the motion was a successive filing of a Rule 3.850 motion and, thus, not properly filed.

37. The Magistrate Judge erred in finding the motion was not properly filed, and the District Court erred in accepting the recommendation of the Magistrate Judge.

38. "A court considering whether the 'tolling language' of the AEDPA applies must look to the state." (Supplemental Report of Magistrate Judge, p. 3).

39. In Florida, a prisoner who seeks postconviction relief can file a Rule 3.850 motion for postconviction relief within two (2) years after the judgement and conviction become final in a noncapital case. Fla. R. Crim. P. 3.850 (b). This rule permits filing a second motion if the first motion was denied due to its facial insufficiency (e.g., improper or no oath) and not on the merits OR when the prisoner alleges new grounds for relief (e.g., newly discovered evidence). Fla. R. Crim. P. 3.850 (a)(b), (f); accord, Wilkinson v. State, 750 So. 2d 723, 725, n. 3 (Fla. 1st DCA 2000); Wright v. State, 741 So. 2d 1146, n. 1, 2 (Fla. 2d DCA 1999).

40. Petitioner's first Rule 3.850 motion did not contain

the required oath. The trial court dismissed this motion on the ground it was facially insufficient.

41. Petitioner's second Rule 3.850 motion alleged newly discovered evidence pursuant to the rule's provisions for such claims. However, the motion was not denied because it was improperly filed due to noncompliance with the rule's filing requirements. Instead, the trial court denied the motion, and the appelate court affirmed the denial, based on the trial court's finding that the allegations contained in the motion did not "constitute legal grounds," and was "insufficient in substance to support the relief prayed," clearly alluding to the merits of the claims. (See Exhibit ONE, "Order of Denial"). Nothing in the trial court's order of denial states the motion was successive, time-barred, or otherwise improperly filed. It is indisputable that the motion was properly filed and denied solely on the merits.

42. In Ortiz v. Barnett, 121 S.Ct. 361 (2000), the Court held that a properly filed postconviction motion is one which meets the filing requirements of the State's postconviction rule, irrespective of the merits of the allegations and issues raised in it. Id. Accord, Delaney v. Florida Department of Corrections,

Michael Moore, Sic., 14 Fla. L. Weekly Fed. C 592 (11th Cir. April 26, 2001).

43. Here, contrary to the findings in the Supplemental Report of the Magistrate Judge (to wit: "State motions for postconviction relief which are successive or time-barred are not properly filed applications which toll the statute of limitations"), the Court's ruling in Artuz, supra, and Delaney, supra, now holds otherwise, making successiveness or time-bars issues for the state courts to determine after a filing pursuant to the rule's requirements. Id. Artuz, 121 S.Ct. 361 (2000) ("... the question whether an application has been 'properly filed' is quite separate from the question whether the claims contained in the application are meritorious and free of procedural bar"),

> "An application is 'properly filed' when its delivery and acceptance are in compliance with the applicable rule governing filings."

Id. 121 S.Ct. at 364; accord Delaney, 14 Fla. L. Weekly Fed. C592 (11th Cir. April 6, 2001) (finding that a motion is "properly filed" under § 2244(d)(2) when the motion, on its face meets state procedural and filing requirements); Weekly v. Moore, 14 Fla. L. Weekly Fed. C472A (11th Cir. March 15, 2001) (the court's remand held that in light of

Artuz, a successive state postconviction motion constitutes a "properly filed" petition for purpose of tolling AEDPA's statute of limitations period).

44. Petitioner's state motion was filed November 26, 1996, into the AEDPA's grace period, met the rule's filing requirements, and was denied on the merits, accord, Artuz.

45. Therefore, pursuant to Artuz, Weekly, and Delaney, Petitioner requests that this Court's dismissal of his application for writ of habeas corpus as "time-barred" be reversed for further proceedings consistent with Artuz, its progeny, and § 2244(d)(2) of the AEDPA.

WHEREFORE, in the interest of justice, Petitioner prays this Honorable Court grants this motion and reverses this cause for further proceedings.

Respectfully Submitted,

Aurelio O. Gonzalez, pro-se.
DOC# 047467 H3-215-U.
Gulf Correctional Institution.
500 Ike Steele Road;
Wewahitchka, Florida. 32465.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "RULE 60(B) MOTION TO AMEND OR ALTER JUDGEMENT" was furnished to: Office of the Attorney General, Miami Regional Office, Criminal Appeals Division, Rivergate Plaza, Suite 950, 444 Brickell Avenue, Miami, Florida 33131, by delivery to the Gulf Correctional Institution mailroom official for mailing by U.S. Mail on this 30 day of July, 2001.

Aurelio C. Gonzalez., PRO SE.
DOC #087467, H3-215-U.
Gulf Correctional Institution.
500 Ike Steele Road;
Wewahitchka, Florida. 32465.

Exhibit One

cc dft/spc/myrtle

19

☒ IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA.
☐ IN THE COUNTY COURT IN AND FOR DADE COUNTY, FLORIDA.

DIVISION	ORDER DENYING MOTION FOR RELIEF PURSUANT TO RULE 3.850	(2ND)	CASE NUMBER
☒ CRIMINAL ☐ TRAFFIC ☐ OTHER	☐ With Evidentiary Hearing ☒ Without Evidentiary Hearing	RCA 33-917	81-28648 82-1791 82-934

THE STATE OF FLORIDA VS.

AURELIO OCANA GONZALEZ
also known as
AURELIO ACANA

PLAINTIFF DEFENDANT(S)

FILED
CLOCK IN
DEC 26 1995
J. BICKETT
CLERK

THIS CAUSE HAVING COME BEFORE THE COURT upon the motion of the above prisoner for relief pursuant to RULE 3.850, Criminal Procedure, and the Court having examined said motion and finding that the allegations contained therein do not constitute legal grounds for granting the New Trial or release of the prisoner, and the motion being insufficient in substance to support the relief prayed, it is thereupon

ORDERED AND ADJUDGED that the motion for relief pursuant to RULE 3.850, Criminal Procedure, be, and the same is hereby DENIED.

The movant is advised that he/she has the right to appeal within thirty days of the rendition of this order and is further advised that he/she file a motion for rehearing within fifteen days of the date of service of this order.

DONE AND ORDERED at Miami, Florida, this 10th day of December, 19 96.

MICHAEL B. CHAVIES JUDGE

I CERTIFY that a copy of this order has been furnished to the Movant, AURELIO OCANA GONZALEZ

_____, by mail this 26th day of December, 19 96.

Deputy Clerk 0798

cc 12/13/96 WHITE - FILE COPY YELLOW - MOVANT

RECORDED
DEC 27 1996.
Clerk of Circuit & County Courts

OFF REC BK
17477PG0393

CLK/CT 124 5/89

A-3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 97-1935-CIV-UNGARO-BENAGES

AURELIO O. GONZALEZ,
Petitioner,

v.

HARRY K. SINGLETARY,
Respondent.
_____/

ORDER DENYING MOTION TO AMEND AND CLOSING CASE

THIS CAUSE is before the Court upon Petitioner's Motion to Amend and Correct (DE 33), filed August 2, 2001.

THE COURT has considered the Motion, the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that the Motion is DENIED. Petitioner already has taken an appeal to the Eleventh Circuit. Accordingly, this Court no longer has jurisdiction over his claims. It is further

ORDERED AND ADJUDGED that this matter is CLOSED.

DONE AND ORDERED in Chambers at Miami, Florida, this 5 day of March, 2002.

URSULA UNGARO-BENAGES
UNITED STATES DISTRICT JUDGE

copies provided:
Magistrate Judge Sorrentino
Aurelio O. Gonzalez, *pro se*

34
1/3

CIV - UNGARO - BENAGES

MAGISTRATE JUDGE SORRENTINO

AO 241 (Rev. 5/85)

PETITION UNDER 28 USC § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court | District Southern | Docket No. 97 1935

Name Aurelio O. Gonzalez | Prisoner No. 087467

Place of Confinement Okaloosa Correctional Institution Dorm O-1113-Lower 3189 Little Silver Road Crestview, FL 32539-6708

FILED by D.C. JUL 23 1997

Name of Petitioner (include name under which convicted) Aurelio O. Gonzalez

v. Name of Respondent (authorized person having custody of petitioner) HARRY K. SINGLETARY, Secretary Florida Dept. of Corrections

The Attorney General of the State of Florida - Robert Butterworth

PETITION

1 Name and location of court which entered the judgment of conviction under attack Florida's 11th Judicial Circuit Court, Miami (Dade County)

2. Date of judgment of conviction 08 December 1982

3 Length of sentence 5 concurrent 99 year prison term with 3 yrs minimum mandatory.

4 Nature of offense involved (all counts) Robbery with a firearm (3 counts); armed burglary; armed kidnapping

5 What was your plea? (Check one)
(a) Not guilty ☒
(b) Guilty ☐
(c) Nolo contendere ☐
If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:
N/A

6 If you pleaded not guilty, what kind of trial did you have? (Check one) N/A
(a) Jury ☐
(b) Judge only ☐

7 Did you testify at the trial? N/A
Yes ☐ No ☐

8 Did you appeal from the judgment of conviction?
Yes ☐ No ☒

cat / div B Dade
Case # 82CR435
Judge ILLB Mag CHS
Morn llp NG Fee pd $ NO
Receipt # —

AO 241 (Rev. 5/85)

9. If you did appeal, answer the following:

(a) Name of court N/A

(b) Result N/A

(c) Date of result and citation, if known N/A

(d) Grounds raised N/A

(e) If you sought further review of the decision on appeal by a higher state court, please answer the following:

(1) Name of court N/A

(2) Result N/A

(3) Date of result and citation, if known N/A

(4) Grounds raised N/A

(f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:

(1) Name of court N/A

(2) Result N/A

(3) Date of result and citation, if known N/A

(4) Grounds raised N/A

10 Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?
Yes ☒ No ☐

11 If your answer to 10 was "yes," give the following information

(a) (1) Name of court Florida's 11th Judicial Circuit Court

(2) Nature of proceeding 3.850 motion for post conviction relief

(3) Grounds raised Newly discovered evidence renders defendant's pleas unintelligent unknowing and involuntary.

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☑

(5) Result Denied

(6) Date of result December 10 1996

(b) As to any second petition, application or motion give the same information: Note: The 3850 listed supra is the only one petitioner knows precise information on. One or two prior 3850 motions were summarily denied.

(1) Name of court

(2) Nature of proceeding

(3) Grounds raised not sure

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☑

(5) Result Denied

(6) Date of result Unknown

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?
(1) First petition, etc Yes ☐ No ☑
(2) Second petition, etc Yes ☑ No ☐ (Of the 1996 3,850 was the 2nd one).

(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:
N/A

12 State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, you *should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
(b) Conviction obtained by use of coerced confession.
(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
(e) Conviction obtained by a violation of the privilege against self-incrimination.
(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
(g) Conviction obtained by a violation of the protection against double jeopardy.
(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
(i) Denial of effective assistance of counsel.
(j) Denial of right of appeal.

A. Ground one: Newly discovered evidence renders petitioner's pleas unintelligent, unknowing and involuntary.

Supporting FACTS (state *briefly* without citing cases or law) Prior to pleading guilty, the interpreter told me off the record that my lawyer said if I plead guilty I would serve no more than 13 years. However, if I did not plead guilty I would get a death sentence. Based upon counsel's advice, I pled guilty. Nearly 14 years have passed since then and I still have not been released. I could not know I would not be released in 13 years until I actually served 13 years. Therefore, this evidence is newly discovered. If not for counsel's erroneous advice that he'd be released in this, defendant would not have pled guilty and would have insisted on taking his chances with a jury trial. Based on these facts, petitioner's pleas are unknowing, unintelligent and involuntary in violation of Boykin vs. Alabama, Brady vs. U.S., Strickland vs. Washington and Hill vs. Lockhart (all U.S. Supreme Court cases).

B. Ground two. N/A

Supporting FACTS (state *briefly* without citing cases or law): N/A

C. Ground three: N/A

Supporting FACTS (state *briefly* without citing cases or law): N/A

D. Ground four: N/A

Supporting FACTS (state *briefly* without citing cases or law): N/A

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: N/A

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?
Yes ☐ No ☑

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein.
(a) At preliminary hearing: Public defender of the 11th Judicial Circuit Court

(b) At arraignment and plea: Same as above

(c) At trial: Same as above

(d) At sentencing: Same as above

(e) On appeal: N/A

(f) In any post-conviction proceeding: pro se

(g) On appeal from any adverse ruling in a post-conviction proceeding: pro se

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?
Yes ☑ No ☐

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes ☐ No ☑
(a) If so, give name and location of court which imposed sentence to be served in the future: N/A

(b) Give date and length of the above sentence: N/A

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes ☐ No ☐ N/A

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

N/A
Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

June 17 1997
(date)

Signature of Petitioner

INMATE REQUEST

STATE OF FLORIDA
Department of Corrections
(Instructions on Back)

Mail Number _____
Team Number _____

TO: (Check One) ☐ Superintendent ☐ Asst. Superintendent ☐ Classification ☐ Security ☐ Medical ☐ Dental ☒ Other Bus. office

FROM:	Inmate Name	DC Number	Quarters	Job Assignment	Date
	Aurelio O. Gonzalez	087467	0-1113	F/S	6/12/97

REQUEST

Please supply me with a computer printout of my account for the past six months for the Federal Govt. Also please fill out the certificate on the attached Federal form.
Thank You.

All requests will be handled in one of the following ways: 1) Written information or 2) Personal interview. All informal grievances will be responded to in writing.

DO NOT WRITE BELOW THIS LINE

RESPONSE

Information completed and attached

Official (Signature) D. Jenkins Date 6/13/97

Distribution: WHITE Returned to Inmate
CANARY Returned to Inmate
PINK Retained by Official Responding or, if the response is to an informal grievance then forward to be placed in inmate's file.

DC3-005 (8-89)

A-5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 97-1935-CIV-UNGARO-BENAGES
MAGISTRATE JUDGE SORRENTINO

AURELIO O. GONZALEZ, :

Petitioner, :

v. : ORDER

HARRY K. SINGLETARY, et al., :

Respondents. :

CLERK U.S. DIST. CT.
S.D. OF FLA - MIAMI
97 OCT -9 PM 1:44
D.C.

This Cause is before the Court upon the petitioner's motion to amend his petition for writ of habeas corpus filed pursuant to 28 U.S.C. §2254, filed October 1, 1997. The government filed its response in this case on September 1, 1997.

It is thereupon

ORDERED AND ADJUDGED as follows:

1. The motion to amend the petition for writ of habeas corpus, filed on October 1, 1997, is granted.

2. The petitioner shall file the amendment on or before November 5, 1997.

3. The amendment shall be captioned with Case No. 97-1935-Civ-Ungaro-Benages and contain a certificate of service indicating a copy was sent to Paulette Taylor, counsel for the respondent.

4. On or before December 7, 1997, the state may supplement its response.

DONE AND ORDERED at Miami, Florida, this 9 day of October, 1997.

Charles A. Sorrentino
UNITED STATES MAGISTRATE JUDGE

cc: Aurelio O. Gonzalez, Pro Se
DC# 087467, Dorm D-113-Lower
Okaloosa Correctional Institution
3189 Little Silver Road
Crestview, FL 32539

Paulette R. Taylor, AAG
Department of Legal Affairs
444 Brickell Avenue
Suite 950
Miami, FL 33131

A-6

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

FILED BY _____ D.C.

97 NOV 12 AM 10:50

CLERK U.S. DIST. CT.
S.D. OF FLA. - MIAMI

AURELIO O. GONZALES,
Petitioner,

vs.

CASE NO: 97-1935-CIV-UNGARO-BENAGES
MAGISTRATE JUDGE SORRENTINO

HARRY K. SINGLETARY,
Respondents.

_____/

AMENDED MOTION FOR PETITION OF HABEAS CORPUS

This cause is based on the Petitioner's motion to amend his petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, on October 1, 1997. This court Ordred the Petitioner to file his amended motion based on newly discovered motion.

In support of this amended petition the Petitioner in sub-judice, will show:

1. Petitioner could not have discovered newly discovered evidence through due dilegence when he did not know that the sentencing court relied on criminal records of a white male by the same name and date of birth of the petitioner, when in fact the Petitioner is a balck hispanic male.

2. Sentencing judge passed a 99 years sentence, by accepting the state's offer, due to believing that the Petitioner had an extemsive criminal record.

3. Sentencing judge was not the same person that signed the Order for sentencing.

(1)

NON-COMPLIANCE OF S.D. fla. L.R 5.1.A.1

10/8

The Petitioner contends that to obtain new evidence on newly discovered evidence one must show, inter alia, facts from which court may infer diligence on part of movement. In the instant case the Petitioner had no prior knowledge, nor could he had known that another person which had his same name and same date of birth had a past record which the court thought belong to the Petitioner. The records in question were discovered by the Petitioner's family reviewing **Criminal Justice Information System**, which revealed the Petitioner's past history, and this system contain mixed information attributed to him where in fact these offenses were committed by someone else.

During the sentencing proceeding the Judge had made some comments that he knows this individual, however, the Petitioner did not then understand the essence of this comment. The Petitioner had never been before this court for sentencing and the comment of he knows this individual did not alert the Petitioner that something was wrong. See attached exhibits. These exhibits will show that a white male by the name of Aurelio Ocana Gonzales, with the same date of birth of the Petitioner was convicted for Robbery/force, battery, Alcohol violation, attempted solicitation first degree felony, petit theft, resisting officer with violence. When the court accepted the Petitioner's plea of guilty, it passed a sentence of 99 years, influnced by this record and recorded offenses which

the Petitioner never committed. Had this record not influenced the trial court the probability that this type of sentence would be imposed would had been less of a consideration.

Notwithstanding that counsel for the defense misadvised the Petitioner that if he proceeded to trial he would be facing the death sentence, and that on a 99 years sentence he would be serving only 13 years, both source of information being inaccurate and unfairly inducing the plea, but allowed the Petitioner to be further prejudiced by not investigating the information on the Pre-sentence investigation report, therefore, depriving the trial court of passing a sentence based on adequate information.

New trial or resentencing is not warranted by evidence which, with reasonable diligence, could have been discovered and produced at trial. **U.S. Wright,** 845 F.supp. 1041, affirmed 46 F.2d 1120 (1994). In this case such information could not have been discovered through due diligence, when defense counsel did not bother to give the proper information for the Petitioner's plea entry. The Petitioner did not understand English and relied on counsel's performance and professional skills.

In essence this is an involuntary plea entry, pro se litigant did not raise this issue as a involuntary and unintelligent plea entry, but this is cause for prejudice and the question should be treated as such.

Florida Rules of Criminal Procedure, 3.171 states that ultimate responsibility for sentence determination rests with the trial judge. If a trial judge ins considering past records which does not belong to the Petitioner, then the judgment of the trial court can not be considered a ture and correct judgment of the court. The rule mandates that the complete term of any plea agreement, including specificaaly all obligations the defendant will incur as a result shall be discussed. The trial judge further must have factual basis in accepting the plea and the prosecutor must apprise the trial judge of all material facts known to the attorney regarding the offense and the defendant's backround prior to the acceptance of a plea by a trial judge. It is obvious that this was not done if part of the records contain distored information and the State did not bother to make the determination that the pre-sentence investigation before the court was accurate information.

In the instant case the State of Florida has not producedd the records that will determin whether the Petitioner is or not entitled to relief.

When a person is serving a 99 years prison term, there is no reason why records should be destroyed. The end of justice is not serve when records condeming a person to such a term can not be confirmed on the face of the records to determine whether any illegality existed when the Petitioner entered a plea of guilty. It is irresponsible of the State of Florida to have such a system that would destroyed a plea colloguy that affected a person's life.

Records that were review through the **Criminal Justice Information System** , of the Public inquiry detailed case information is in conflict with who sentenced the Petitioner. See Exhibits. the records of judgment and sentence shows a Judge Theodore G. Matos signing sentencing papers, however, the Judge who imposed the sentence was Manuel A. Crespo. The record attached shows that for case F820011791, sentence was imposed on 12-8-82 for 99 years, but there is no Judge Matos, which imposed the sentence. Most important however, is the fact that a plea of guilty as been accepted by the State without preserving the records. See **Wingard v State**, 234 So.2d 166 (1970), where it was held:

> " Where there was no transcript of arraignment proceedings, record on appeal from denial of postconviction relief did not show that plea of guilty was voluntary and defendant was entilted to evidentiary hearing.

These records attached to this petition should have been in the respondent's possession. Instead, they were recovered through the information system of criminal justice, illustrating, among other things, that the respondent records in regards to this petitioner had never been in ordered or under proper information.

The respondent offered a 99 years term and the court after reviewing the Petitioner's record accepted this term under the assumption that the Petitioner had an extensive past criminal record, where in fact the Petitioner was arrested for the first time in sub-judice and never had a past record. The State of Florida has admitted to this court that they have destroyed the records pertaining to the petitioner's plea colloguy and pre-sentence investigation, therefore, the respondent can not show this court that the Petitioner's plea entry validly entered. It can not show this court why a Judge Crespo, appears as the sentencing judge, but a Judge Matos signed the sentencing papers. The respondent can not show this court if by presenting a pre-sentence investigation which contained convictions falsely attributed to the Petitioner, that the trial court did not get influenced by passing the type of sentence that it did on the Petitioner. The Petitioner respectfully request for this court to Order the respondent an evidentiary hearing.

The Petitioner asserts that not only was his plea unfairly induced in violation of his 14th Amendment rights, but he proceeded entering the plea with a record which affected the type of sentence he would receive by the court. In the interest of justice this case should be heard and an evidentiary hearing granted to resolve the conflicts that exit surrounding the Petitioner's plea.

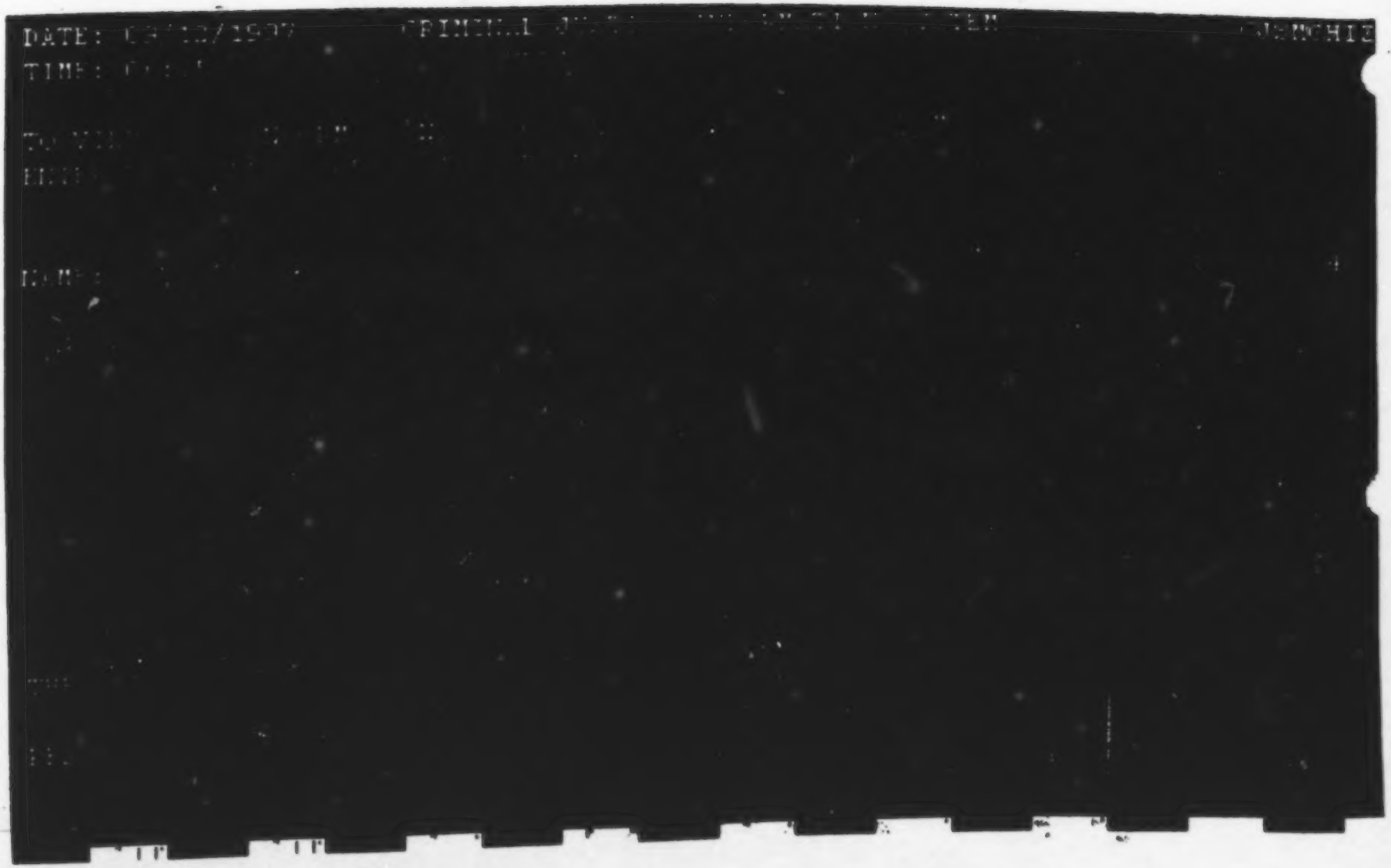
Respectfully Submitted,

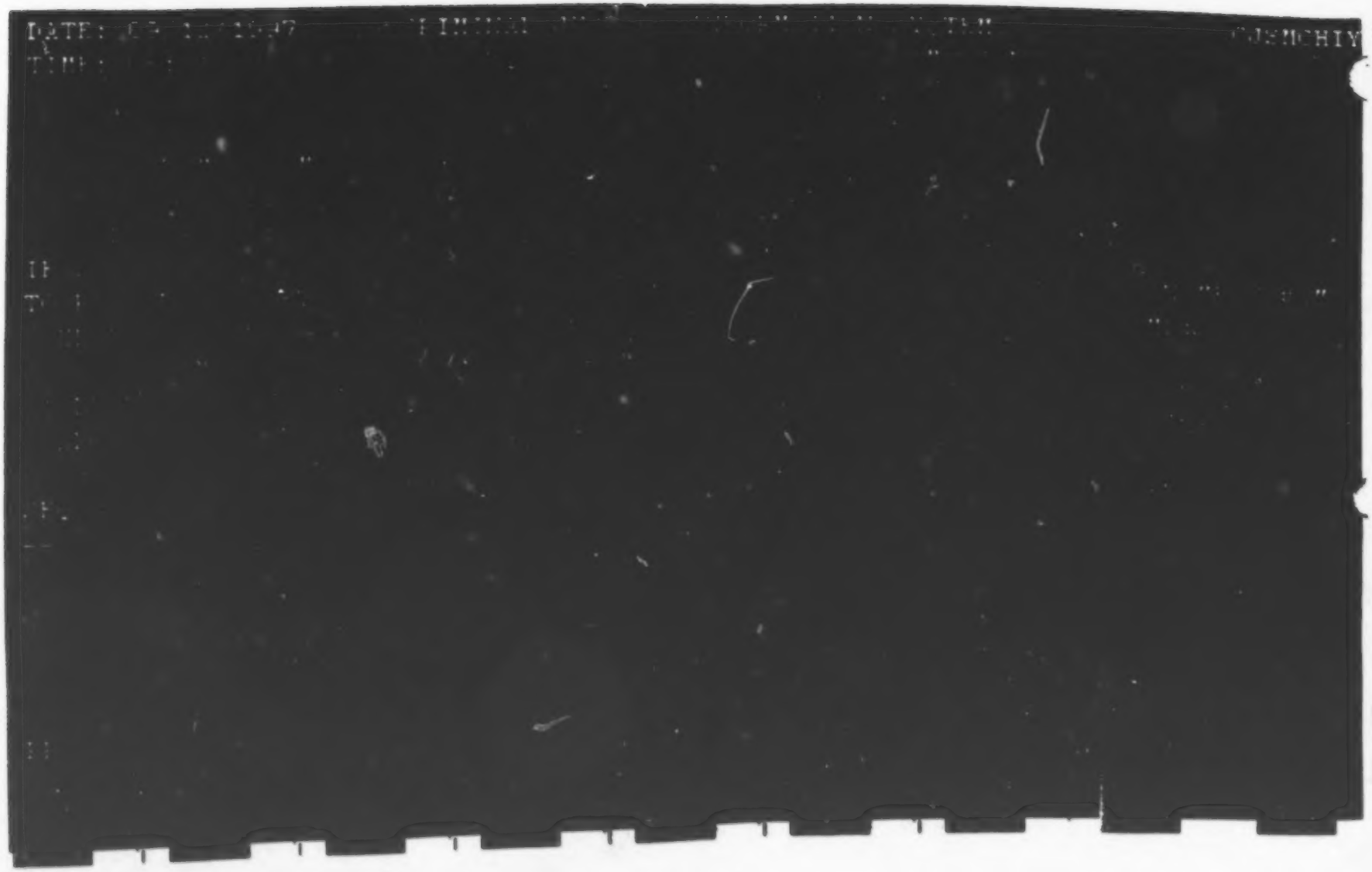
C. C. Gee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of this motion to amend was funished to the Assistant Attorney General, Paulette R. Taylor, at Department of Legal Affatrs, the capitol, Tallahassee, Florida 32399, this 4 day of Nov. of, 1997.

BEST AVAILABLE COPY





UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 97-1935-CIV-UNGARO-BENAGES
MAGISTRATE JUDGE SORRENTINO

AURELIO O. GONZALEZ	:	
Petitioner,	:	
v.	:	REPORT RE DISMISSAL OF §2254 PETITION AS TIME BARRED
HARRY K. SINGLETARY,	:	
Respondents.	:	

This petition for writ of habeas corpus pursuant to 28 U.S.C. §2254 was signed under penalty of perjury on June 17, 1997, and file stamped by the clerk on June 23, 1997.[1] The judgment of conviction in the underlying state criminal case, No. 81-28648, entered in Dade County, became final on January 9, 1983, when time expired for filing a notice of appeal.[2]

Pursuant to 28 U.S.C. §2244, as amended on April 24, 1996, a one year period of limitations applies to a petition under §2254. The one year period runs from the latest of

13
DOD

[1]A prisoner's pleading is deemed to be filed on the date it is delivered to prison authorities for mailing. Houston v. Lack, 487 U.S. 266 (1988); Hostler v. Groves, 912 F.2d 1158 (9 Cir. 1990). The petitioner has been given the benefit of doubt. His petition was signed on April 30, 1997, and is deemed filed as of that date.

[2]In Florida, if the defendant does not appeal, the sentence becomes final upon expiration of the thirty-day appeal period. Fla.R.App.P. 9.110(b); Demps v. State, 696 So.2d 1296, 1297, n.1 (Fla. 3d DCA 1997); Ramos v. State, 658 So.2d 169 (Fla. 3d DCA 1995); Caracciolo v. State, 564 So.2d 1163 (Fla. 4th DCA 1990; Quat v. State, 535 So.2d 642 (Fla. 1st DCA 1988).

(1) The date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(2) The date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(3) The date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) The date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under the statute.

Although the Eleventh Circuit Court of Appeals has not decided to what extent the AEDPA applies to habeas corpus applications or motions to vacate relating to events preceding that date, it is becoming apparent that the majority position is represented by decisions such as Reyes v. Keane, 90 F.3d. 676 (2 Cir. 1996), where the court held that the new limitations period would apply to a §2254 petition filed prior to the effective date of the AEDPA, but provided a one-year grace period (the equivalent of the new

limitations period) commencing as of the Act's effective date. See, e.g., Calderon v. United States District Court for the Central District of California, 112 F.3d. 386 (9 Cir. 1997)("No petition filed on or before April 23, 1997 -- one year from the date of the AEDPA's enactment -- may be dismissed for failure to comply with the section 101 time limit."); United States v. Lopez, 100 F.3d. 113, 116 (10 Cir. 1996)(time limitation to bring a §2255 motion "attaches new legal consequences to events completed before its enactment" and hence would not be applied retroactively to motion filed prior to date of enactment).

The respondent has invoked the statute of limitations. Gonzalez was sentenced on December 8, 1982. He did not prosecute an appeal. His conviction, therefore, became final on January 9, 1983. Because Gonzalez' conviction became final before the effective date of the AEDPA, he receives the benefit of the now generally recognized one year grace period. Gonzalez was required to file this motion on or before April 23, 1997, for this motion to be timely.

Gonzalez addressed the timeliness of his petition in his response to the state. He asserted that his motion for postconviction relief, filed on November 25, 1996, tolled the period of limitation. Gonzalez' conviction became final in January 1993. He did not file his first motion for postconviction relief

became final. Even assuming that the one year limitations period was tolled during all post conviction proceedings, this petition remains barred because far more than one year elapsed after the conviction became final, and the petitioner's last state post conviction proceedings were not instituted until after enactment of the AEDPA.

Gonzalez also asserted in an amended petition for writ of habeas corpus that his petition is timely because the facts upon which his claim is based could not have been discovered by the exercise of due diligence any sooner. He alleges that the Court relied on the criminal records of a white male with the same name and date of birth as his, when in fact he is a black Hispanic male. In his original petition, Gonzalez challenges the validity of his plea, making no mention of another person with his name. Moreover, the original petition was filed on June 17, 1997. The documents provided to support his argument are dated September 12, 1997. Finally, the computer printout provided for Aurelio Ocena Gonzalez shows him as a black male. The data showing white male are for multiple persons with the names Aurelio (or variants thereof) Gonzalez, with different dates of birth.

It is therefore recommended that this petitioner for writ of habeas corpus be dismissed, as time barred. If the petitioner can

show cause that he is within the limitation period as defined above, he may do so in objections to this report.

Objections to this report may be filed with the District Judge within ten days of receipt of a copy of the report.

Dated: July 16, 1998

Charles H. Scrantom
UNITED STATES MAGISTRATE JUDGE

cc: Aurelio O. Gonzalez, Pro SE
DC #087467, Dorm D-113-Lower
Okaloosa Correctional Institution
3189 Little Silver Road
Crestview, FL 32539-6708

Paulette R. Taylor
Assistant Attorney General
Department of Legal Affairs
Rivergate Plaza, Suite 950
444 Brickell Avenue
Miami, FL 33131

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 97-1935-CIV-UNGARO-BENAGES
MAGISTRATE JUDGE SORRENTINO

AURELIO O. GONZALEZ	:	
Petitioner,	:	
v.	:	SUPPLEMENT TO JULY 16, 1998 REPORT OF MAGISTRATE JUDGE
HARRY K. SINGLETARY,	:	
Respondents.	:	

The undersigned submitted a report and recommendation on July 16, 1998. Due to a printing error, the last line on page three was omitted.

It is thereupon

ORDERED AND ADJUDGED that the report entered July 16, 1998, is amended to reflect that the last line on page three reads as follows:

> "until August 8, 1994--almost eleven years after his conviction"

DONE AND ORDERED at Miami, Florida this 14 day of August, 1998.

Charles H. Sorrentino
UNITED STATES MAGISTRATE JUDGE

cc: Aurelio O. Gonzalez, Pro SE
DC #087467, Dorm D-113-Lower
Okaloosa Correctional Institution
3189 Little Silver Road
Crestview, FL 32539-6708

Paulette R. Taylor
Assistant Attorney General
Department of Legal Affairs
Rivergate Plaza, Suite 950
444 Brickell Avenue
Miami, FL 33131

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 97-1935-CIV-UNGARO-BENAGES
MAGISTRATE JUDGE SORRENTINO

AURELIO O. GONZALEZ	:	
Petitioner,	:	
v.	:	SUPPLEMENTAL REPORT OF MAGISTRATE JUDGE
HARRY K. SINGLETARY,	:	
Respondents.	:	

The petitioner has filed objections to the report and recommendation of the undersigned regarding his petition for writ of habeas corpus. Due to the developing law in the area of AEDPA construction, this supplemental report is needed

The pertinent procedural history of this case is as follows. This petition for writ of habeas corpus pursuant to 28 U.S.C. §2254 was signed under penalty of perjury on June 17, 1997, and file stamped by the clerk on June 23, 1997. A report and recommendation of dismissal as time-barred was submitted on July 16, 1998. Gonzalez filed objections to the report and recommendation on July 23, 1998, arguing that his petition was timely filed because the limitations period was tolled during the pendency of his state motion for postconviction relief, filed on November 25, 1996.

The AEDPA provides that the time during which a "properly filed" application for state post-conviction or other collateral review with respect to the pertinent judgment or claim is pending

shall not be counted toward any period of limitation under the statute.

Although the Eleventh Circuit has not addressed the tolling mechanism of the one-year grace period, several circuits have held that the one-year grace-period is also equitably tolled by properly filed applications for state postconviction relief which were pending when the AEDPA was enacted. See Hoggro v. Boone, 1998 WL 419727 (10 Cir. 1998), Miller v. New Jersey State Department of Corrections, 1998 WL 270110 (3 Cir. 1998), Lovasco v. Scig, 134 F.3d 146 (3 Cir. 1998), Caldaron v. United States District Court for the Central District of California, 112 F.3d 386 (9 Cir. 1997).

"A properly filed application" is one submitted in accordance with the state's procedural requirements. Lovasco v. Scig, 134 F.3d 146, 148 (3 Cir. 1998). When determining whether a state pleading is properly filed for purposes of the AEDPA, the Court's inquiry should not focus on the merits of the petition. Id. The "properly filed" requirement refers to the petitioner's compliance with state procedural requirements, such as notice to the respondent, correct place of filing, and timeliness of the motion. Lovasco, supra; Holloway v. Corcoran, 980 F.Supp. 160, 162 (D. Maryland 1997) citing Hughes v. Irvin, 967 F.Supp. 775, 778 (E.D.N.Y. 1997).

If a petitioner complies with state procedural requirements, his petition is a properly filed application for purposes of §2244(d)(2). Lovasco, supra (holding that a successive state petition for postconviction relief was properly filed because the state of Pennsylvania allows petitioners to file successive petitions). Thus, a court considering whether the "tolling language" of the AEDPA applies must look to the state.

In Florida, a prisoner seeking postconviction relief must file a motion for postconviction relief within two years after the judgment and sentence become final in noncapital case. Fla.R.Crim.P. 3.850(b).

A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant or the attorney to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules. Fla.R.Crim.P. 3.850(f).

Gonzalez' conviction became final on January 9, 1983, and he filed his first motion for postconviction relief almost eleven years thereafter on August 8, 1994. (DE# 5; Ex. C). The trial court denied the motion as legally insufficient. (DE# 5; Ex. D). Gonzalez filed his second motion for postconviction relief on

November 21, 1996. (DE# 5; Ex. I). He raised the same claim as that raised in the first motion. The second motion was summarily denied. (DE# 5; Ex. J). The denial was affirmed on appeal and Gonzalez moved for rehearing, arguing that the motion was neither successive nor time-barred. (DE# 5; Ex. K). The motion was denied. (DE# 5; Ex. K).

State motions for postconviction relief which are successive or time-barred are not properly filed applications which toll the statute of limitations.

It therefore remains the recommendation of the undersigned that this petition be dismissed, as time-barred.

Objections to this report may be filed with the District Judge within ten days of receipt of a copy of the report.

Dated: August 14, 1998

Claudia D. Turnoff
UNITED STATES MAGISTRATE JUDGE

cc: Aurelio O. Gonzalez, Pro SE
DC #087467, Dorm D-113-Lower
Okaloosa Correctional Institution
3189 Little Silver Road
Crestview, FL 32539-6708

Paulette R. Taylor
Assistant Attorney General
Department of Legal Affairs
Rivergate Plaza, Suite 950
444 Brickell Avenue

Miami, FL 33131

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 97-1935-CIV-UNGARO-BENAGES
MAGISTRATE JUDGE SORRENTINO

AURELIO O. GONZALEZ, :

Petitioner, :

v. :

HARRY K. SINGLETARY, :

Respondent. :

ORDER OF DISMISSAL OF §2254 PETITION AS TIME BARRED

FILED by D.C.
SEP 9 1998
CLERK U.S. DIST. CT. S.D. OF FLA. - MIAMI

For the reasons stated in the Report of the Magistrate Judge and upon independent review of the file, it is

ORDERED AND ADJUDGED as follows:

1. This petitioner for writ of habeas corpus pursuant to 28 U.S.C. §2254 is dismissed, as time barred, and the case is closed.

2. All motions not otherwise ruled upon are dismissed, as moot.

DONE AND ORDERED at Miami, Florida, this 9 day of Sept., 1998.

UNITED STATES DISTRICT JUDGE

cc: Aurelio O. Gonzalez, Pro SE
Paulette R. Taylor, AAG

A-11

FILED by GS D.C.
FEB 11 2000
CLARENCE MADDOX
CLERK U.S. DIST. CT.
S.D. OF FLA. - MIAMI

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 97-1935-CIV-UNGARO-BENAGES

AURELIO GONZALEZ,
Plaintiff,

vs.

FLORIDA DEPARTMENT
OF CORRECTIONS,
Defendant.
_____/

ORDER GRANTING MOTION FOR PERMISSION TO APPEAL *IN FORMA PAUPERIS*

THIS CAUSE is before the Court upon Petitioner's Motion for Permission to Appeal *In Forma Pauperis*, filed February 7, 2000.

THE COURT has considered the Motion, the pertinent portions of the record and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that the Motion is GRANTED.

DONE AND ORDERED in Chambers at Miami, Florida, this 11 day of February, 2000.

URSULA UNGARO-BENAGES
UNITED STATES DISTRICT JUDGE

copies provided:
Aurelio Gonzalez, *pro se*
counsel of record

REC'D by _____ D.C.
APPEAL
FEB 15 2000
CLARENCE MADDOX
CLERK U.S. DIST. CT.
S.D. OF FLA. - MIAMI

31/53

No:

IN THE
SUPREME COURT OF THE UNITED STATES

AURELIO O. GONZALEZ,
Petitioner,

v.

SECRETARY FOR THE DEPARTMENT OF CORRECTIONS,
James Crosby, Secretary,
Respondent.

CERTIFICATE OF SERVICE

I certify that on this 22nd day of July, 2004, in accordance with Sup. Ct. R. 29, copies of the (1) Petition for Writ of Certiorari, (2) Motion for Leave to Proceed *In Forma Pauperis*, (3) Certificate of Service, and (4) Declaration Verifying Timely Filing, were served by U.S. mail upon Cassandra K. Dolgin, Assistant Attorney General, Office of the Attorney General, The Capitol, Tallahassee, FL 32399-1050 and upon the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001.

KATHLEEN M. WILLIAMS
Federal Public Defender

Miami, Florida
July 22, 2004

By: _____

Paul M. Rashkind, Supervisory
Assistant Federal Public Defender
150 West Flagler Street, Suite 1500
Miami, Florida 33130-1555
(305) 536-6900

No:

IN THE
SUPREME COURT OF THE UNITED STATES

AURELIO O. GONZALEZ,
Petitioner,

v.

SECRETARY FOR THE DEPARTMENT OF CORRECTIONS,
James Crosby, Secretary,
Respondent.

DECLARATION VERIFYING TIMELY FILING

Petitioner, Aurelio O. Gonzalez, through undersigned counsel and pursuant to Sup. Ct. R. 29.2 and 28 U.S.C. § 1746, declares that the **Petition for Writ of Certiorari** filed in the above-styled matter was placed in the U.S. mail in a prepaid first class envelope, addressed to the Clerk of the Supreme Court of the United States, on the 22nd day of July, 2004, which is prior to the time the petition for writ of certiorari is due on July 26, 2004.

KATHLEEN M. WILLIAMS
Federal Public Defender

Miami, Florida
July 22, 2004

By: _____

Paul M. Rashkind, Supervisory
Assistant Federal Public Defender
150 West Flagler Street, Suite 1500
Miami, Florida 33130-1555
(305) 536-6900

ORIGINAL

Supreme Court, U.S.
FILED
DEC 15 2004
OFFICE OF THE CLERK

No. 04-6432

IN THE
SUPREME COURT OF THE UNITED STATES

RESPONSE REQUESTED

AURELIO O. GONZALEZ,

Petitioner,

vs.

JAMES V. CROSBY,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

Respectfully Submitted,

CHARLES J. CRIST, JR.
Attorney General of Florida

CASSANDRA K. DOLGIN
Assistant Attorney General
Counsel of Record

Office of the Attorney General
The Capitol
Tallahassee, FL 32399-1050
(850) 414-3579
(850) 487-0997 (fax)

Attorneys for Respondent

RECEIVED
DEC 17 2004
OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTION PRESENTED (restated)[1]

I. Whether the United States Court of Appeals for the Eleventh Circuit properly determined that under certain circumstances an attempt to reopen a federal habeas petition finally decided on the merits constitutes a successive petition and is subject to the requirements of 28 U.S.C. § 2244(b)?

[1]As discussed infra, at 7 and n.9, petitioner's second question presented is not properly raised before this Court.

TABLE OF CONTENTS

Questions Presented (Restated) i

Table of Contents ii

Table of Authorities iii

Opinion Below 1

Statement of Jurisdiction 1

Constitutional and Statutory Provisions 2

Statement of the Case and Facts 2

Reasons for Denying the Writ 8

Conclusion 26

TABLE OF AUTHORITIES

Pages

Cases

Abdur'Rahman v. Bell, 535 U.S. 1016 (2002) 25

Abdur'Rahman v. Bell, 537 U.S. 88 (2002) 18

Ackermann v. United States, 340 U.S. 193 (1950) 20

Allen v. Mitchell, 276 F.3d 183 (4th Cir. 2001) 21

Artuz v. Bennett, 531 U.S. 4 (2000) ..... 4, 19 and n.17, 20, 21, 22

Banes v. Moore, 532 U.S. 1005 (2001) (Mem.) 20

Bates v. Whitley, 19 F.3d 1066 (5th Cir. 1994) 14

Blackmon v. Armontrout, 2003 U.S. App. LEXIS 4332 (8th Cir. Mar. 12, 2003) (unpublished), cert. denied, 124 S.Ct. 120 (2003) 9

Blackmon v. Money, 27 Fed. Appx. 543 (6th Cir. Dec. 10, 2001) (unpublished) 22

Blair v. Armontrout, 976 F.2d 1130 (8th Cir. 1992), cert. denied, 508 U.S. 916 (1993) 10 n.10

Boufford v. Moore, 532 U.S. 1050 (2001) (Mem.) 20

Bonin v. Vasquez, 999 F.2d 425 (9th Cir. 1993) 10 n.10

Bousley v. United States, 523 U.S. 614 (1998) 14

Boyd v. United States, 304 F.3d 813 (8th Cir. 2002), cert. denied, 538 U.S. 953 (2003) 9

Brooks v. Walls, 301 F.3d 839 (7th Cir. 2002), cert. denied, 538 U.S. 1001 (2003) 21

Brown v. Moore, 532 U.S. 968 (2001) (Mem.) 20

Buell v. Anderson, 48 Fed. Appx. 491 (6th Cir. Sept. 24, 2002) (unpublished) 24

Burris v. Parke, 130 F.3d 782 (7th Cir.), cert. denied, 522 U.S. 990 (1997) 11, 24

Calderon v. Thompson, 523 U.S. 538 (1998) 13, 15 18, 23, 24

Carter v. United States, 150 F.3d 202 (2nd Cir. 1998) 14

Cohen v. Grant, 531 U.S. 988 (2000) (Mem.) 20

Conner v. Lemaster, 1999 U.S. App. LEXIS 2495 (10th Cir. Feb. 18, 1999) (unpublished) 22

Delancy v. Florida Department of Corrections, 246 F.3d 1328 (11th Cir. 2001) 4, 20

Dunlap v. Litscher, 301 F.3d 873 (7th Cir. 2002), cert. denied, 539 U.S. 962 (2003) .. 9, 12, 24

Felker v. Turpin, 518 U.S. 651 (1996) 16

Felker v. Turpin, 101 F.3d 657 (11th Cir.), cert. denied, 519 U.S. 989 (1996) 9

Freeman v. Page, 208 F.3d 572 (7th Cir.), cert. denied, 531 U.S. 946 (2000) 22

Gant v. United States, 1993 U.S. App. LEXIS 26819 (7th Cir. Oct. 7, 1993) (unpublished), cert. denied, 510 U.S. 1183 (1994) 10 n.10

Gitten v. United States, 311 F.3d 529 (2nd Cir. 2002) 9

Gonzalez v. Crosby, 366 F.3d 1253 (11th Cir. 2004) (en banc) 1, 6, 9, 12, 13, 24

Gonzalez v. Secretary for the Florida Dept. of Corrections, 317 F.3d 1308 (11th Cir. 2003), vacated and hearing en banc granted, 326 F.3d 1175 (11th Cir. 2003) 5

Guerroero v. Terhune, 531 U.S. 988 (2000) (Mem.) 20

Guyton v. United States, 23 Fed. Appx. 539 (7th Cir. Sept. 26, 2001) (unpublished) 22-23

Hamilton v. Newland, 374 F.3d 822 (9th Cir. 2004) 18

Harris v. Nelson, 394 U.S. 286 (1969) 14, 14-15, 15

Harris v. United States, 367 F.3d 74 (2nd Cir. 2004) 9, 11, 12

Harvey v. Horan, 278 F.3d 370 (4th Cir. 2002) 13

Hawkins v. Evans, 64 F.3d 543 (10th Cir. 1995) 14

Hayes v. Mills, 532 U.S. 1015 (2001) (Mem.) 20

Hernandez v. Peirson, 2000 U.S. App. LEXIS 30179 (7th Cir. Nov. 22, 2000) (unpublished), cert. denied, 532 U.S. 1068 (2001) 22

Houston v. Lack, 487 U.S. 266 (1988) 3 n.3, 5 n.6

Howard v. Lewis, 905 F.2d 1318 (9th Cir. 1990) 14

Hunt v. Nuth, 57 F.3d 1327 (4th Cir. 1995), cert. denied, 516 U.S. 1054 (1996) 9 n.10

In re Abdur'Rahman, 2004 U.S. App. LEXIS 25609 (6th Cir. Dec. 13, 2004) (en banc) ..... 9, 9-10 n.10, 11 and n.12, 12, 14 n.15, 18

In re: Cook, 215 F.3d 606 (6th Cir. 2000) 13-14, 14 n.15

Israfil v. Russell, 276 F.3d 768 (6th Cir. 2001), cert. denied, 535 U.S. 1088 (2002) 21

Johnson v. Wolfe, 41 Fed. Appx. 733 (6th Cir. Jun. 21, 2002) (unpublished) 21

Kiel v. Scott, 1999 U.S. App. LEXIS 2500 (10th Cir. Feb. 18, 1999) (unpublished), cert. denied, 528 U.S. 1115 (2000) 22

Lazo v. United States, 314 F.3d 571 (11th Cir.), vacated for rehearing en banc, 326 F.3d 1175 (11th Cir. 2003) ..... 5 and n.7, 6 n.8

Lindsey v. Thigpen, 875 F.2d 1509 (11th Cir. 1989) 10 n.10

Lopez v. Douglas, 141 F.3d 974 (10th Cir.), cert. denied, 525 U.S. 1024 (1998) ..... 9, 10, 11, 12, 13 and n.13

McQueen v. Scroggy, 99 F.3d 1302 (6th Cir. 1996), cert. denied, 520 U.S. 1257 (1997) 9-10 n.10, 10

Merritt v. Monroe, 326 F.3d 157 (3rd Cir.), cert. denied, 540 U.S. 921 (2003) 21

Mobley v. Head, 306 F.3d 1096 (11th Cir. 2002), vacated and hearing en banc granted, 326 F.3d 1175 (11th Cir. 2003) ..... 5 and n.7, 6 n.8

Moreland v. Lazaroff, 531 U.S. 988 (2000) (Mem.) 20

Morgan v. Money, 2000 U.S. App. LEXIS 1914 (6th Cir. Feb. 8, 2000) (unpublished) 22

Muniz v. United States, 236 F.3d 121 (2nd Cir. 2001) 17 n.16

Munoz v. United States, 331 F.3d 151 (1st Cir.), cert. denied, 124 S.Ct. 587 (2003) 9

Ortiz v. Stewart, 195 F.3d 520 (9th Cir. 1999) 9

Pace v. DiGuglielmo, 125 S.Ct. 26 (Sept. 28, 2004) (No. 03-9027) 21

Palmer v. Corcoran, 1999 U.S. App. LEXIS 23336 (4th Cir. Sept. 14, 1999) (unpublished) 22

Pitchess v. Davis, 421 U.S. 482 (1975) 15, 24

Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995) 14, 24

Polites v. United States, 364 U.S. 426 (1960) 20

Pridgen v. Shannon, 380 F.3d 721 (3rd Cir. 2004), pet. for cert. filed (10/29/04) (No. 04-7060) 17

Reid v. Angelone, 369 F.3d 363 (4th Cir. 2004) 12-13

Reinoso v. Artuz, 1999 U.S. Dist. LEXIS 7768 (S.D.N.Y. Apr. 14, 1999) (unpublished) 23

Rodriguez v. Mitchell, 252 F.3d 191 (2nd Cir. 2001) 11-12

Rodwell v. Pepe, 324 F.3d 66 (1st Cir.), cert. denied, 124 S.Ct. 224 (2003) 9, 11

Romaine v. Woods, 2000 U.S. App. LEXIS 18606 (9th Cir. Jul. 26, 2000) (unpublished) 22

Sanders v. United States, 373 U.S. 1 (1963) 16

Sargent v. Columbia Forest Prods., 75 F.3d 86 (2nd Cir. 1996) 23, 24

Schlup v. Delo, 513 U.S. 298 (1995) 14

Siebert v. Campbell, 334 F.3d 1018 (11th Cir. 2003) 21

Slack v. McDaniel, 529 U.S. 473 (2000) 10 n.10, 13 n.14, 16, 17 n.16, 18, 19

Stafford v. Thompson, 328 F.3d 1302 (11th Cir. 2003) 21

Stewart v. Martinez-Villareal, 523 U.S. 637 (1998) 13 n.14, 16, 17 n.16, 18, 19

Tal v. Miller, 1999 U.S. Dist. LEXIS 652 (S.D.N.Y. Jan. 11, 1999) (unpublished) 23

Thomas v. Roe, 23 Fed. Appx. 847 (9th Cir. Dec. 27, 2001) (unpublished) 22

Thompson v. Calderon, 151 F.3d 918 (9th Cir.), cert. denied, 524 U.S. 965 (1998) 9, 12

Tinker v. Hanks, 531 U.S. 987 (2000) (Mem.) 20

United States v. Bey, 2004 U.S. App. LEXIS 23915 (10th Cir. Nov. 16, 2004) (unpublished) 12, 13 n.13

United States v. Edwards, 309 F.3d 110 (3rd Cir. 2002) 9

United States v. MacDonald, 1998 U.S. App. LEXIS 22073 (4th Cir. Sept. 8, 1998) (unpublished) 12

United States v. Rich, 141 F.3d 550 (5th Cir. 1998), cert. denied, 526 U.S. 1011 (1999) 9

United States v. Winestock, 340 F.3d 200 (4th Cir.), cert. denied, 124 S.Ct. 496 (2003) 9, 12, 24

Wade v. Battle, 379 F.3d 1254 (11th Cir. 2004) 21

Weatherspoon v. Moore, 531 U.S. 988 (2000) (Mem.) 20

Webster v. Moore, 199 F.3d 1256 (11th Cir.), cert. denied, 531 U.S. 991 (2000) 22

Weekley v. Moore, 531 U.S. 1063 (2001) (Mem.) 20

Williams v. Cain, 217 F.3d 303 (5th Cir. 2000) 21-22

Williams v. Sims, 2004 U.S. App. LEXIS 24751 (7th Cir. Dec. 1, 2004) 21

Williams v. Whitley, 994 F.2d 226 (5th Cir.), cert. denied, 510 U.S. 1014 (1993) 9 n.10

Wright v. Norris, 299 F.3d 926 (8th Cir. 2002) 21

Statutes and Rules

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 2

28 U.S.C. § 2244(b) ..... i, 1, 2, 8, 9, 11, 12, 13 and n.14, 16, 17

28 U.S.C. § 2244(d) ..... 3, 15, 17 and n.16, 19, 20, 21, 22

28 U.S.C. § 2253(b) 21

28 U.S.C. § 2254 ..... 6 n.8, 8, 11 n.11, 14, 15, 20

28 U.S.C. § 2255 ..... 6 n.8, 8, 11 n.11, 14, 16

United States Supreme Court Rule 10 ..... 18, 25

Federal Rule of Appellate Procedure 4 ..... 4 n.6

Federal Rule of Civil Procedure 1 ..... 15, 23-24

Federal Rule of Civil Procedure 26 15

Federal Rule of Civil Procedure 33 15

Federal Rule of Civil Procedure 60(b) ..... *passim*

Federal Rule of Civil Procedure 81(a)(2) 15, 23-24

Rules Governing Section 2254 Cases, Rule 9(b) 10 n.10

Rules Governing Section 2254 Cases, Rule 11 15-16

Florida Supreme Court Rule 3.850 2

No. 04-6432

IN THE
SUPREME COURT OF THE UNITED STATES

AURELIO O. GONZALEZ,

Petitioner,
vs.
JAMES V. CROSBY,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

OPINION BELOW

Petitioner, Aurelio O. Gonzalez, seeks review of the April 26, 2004 en banc opinion of the Unites States Court of Appeals for the Eleventh Circuit, holding, inter alia, that Gonzalez's motion for relief from judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure constituted a successive petition for which petitioner had not obtained authorization to bring pursuant to 28 U.S.C. § 2244(b), reported at Gonzalez v. Crosby, 366 F.3d 1253 (11th 2004).

STATEMENT OF JURISDICTION

Petitioner seeks jurisdiction pursuant to 28 U.S.C. § 1254(1) and Part III of the Rules of the United States Supreme Court. Petition, at 2. The State agrees that petitioner's request for

discretionary review is from a case from a United States court of appeals following rendition of judgment. As discussed below, however, the Eleventh Circuit did not address petitioner's second question presented and the issue is therefore not properly before this Court. See infra, at 7 and n.9.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The State agrees that Rule 60(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 2244(b) are involved in the issue presented. Neither the Suspension Clause nor the Due Process Clause to the United States Constitution, however, are implicated by the decision of the United States Court of Appeals for the Eleventh Circuit. In addition, petitioner's reference to 28 U.S.C. § 1291 in the argument portion of his petition, at 30, is not involved in the issue herein presented.

STATEMENT OF THE CASE AND FACTS[2]

Petitioner, Aurelio O. Gonzalez, was convicted of committing three counts of robbery with a firearm, one count of armed burglary, and one count of armed kidnapping, upon his guilty pleas, obtained in the Circuit Court of Dade County, Florida. See R1:1. The trial court sentenced petitioner on December 8, 1982, to a term of ninety-nine (99) years imprisonment. Id. Petitioner's first state postconviction relief motion, R:1:5:Ex. C, brought pursuant to Florida Supreme Court Rule 3.850, was denied as "legally insufficient" on September 14, 1994. R:1:5:Ex. D. Petitioner filed a successive motion for postconviction relief, R:1:5:Ex. I, outside the two-year state limitation period, which was summarily denied. R:1:5:Ex. J.

---

[2]Consistent with petitioner, Respondent's citation to the record on appeal includes volume number, district court document number, and, where applicable, page number. See Petition, at 5. In addition, where applicable, citation will be made to the parties' briefs filed in the court of appeals.

Petitioner filed his petition for writ of habeas corpus in the United States District Court of Florida, Southern Division on June 23, 1997.[3] R1:1. He raised one ground for relief, asserting that newly discovered evidence rendered his guilty pleas invalid. The State, in its response to a show cause order, asserted that the petition was time-barred and, in addition, the claim was procedurally defaulted. R1:1:4-5. The district court permitted petitioner to amend his petition, R1:9, which was filed on November 12, 1997. R1:10. In its response to the amended petition, the State reasserted its earlier arguments. R1:12:3-4.

On July 16, 1998, the magistrate judge issued her "Report Re Dismissal §2254 Petition As Time Barred," recommending dismissal of the petition as having been filed outside of the one-year limitation period under 28 U.S.C. § 2244(d). R1:13:3-4; see also R1:15. Petitioner filed objections to the recommendation. R1:14. The magistrate judge subsequently issued a "Supplemental Report" on August 17, 1998, again recommending dismissal of the petition as time-barred. R1:16:4. The district court entered its "Order Of Dismissal of §2254 Petition As Time Barred" on September 9, 1998. R1:17.

On September 23, 1998, petitioner filed his notice of appeal from the denial of habeas corpus relief, R1:20, and filed a motion for a certificate of appealability ("COA"). R1:22. In an Order dated October 19, 1998, the district court granted COA without elaboration. R1:23. Petitioner's appeal was dismissed without prejudice on October 28, 1999 and the application for COA remanded "to the

---

[3]Arguably, petitioner's original petition was filed on June 17, 1997, when he purportedly placed the petition into the prison mail system. See Houston v. Lack, 487 U.S. 266, 275 (1988). The copy of the petition received by Respondent reflects a "Filed" date of June 23, 1997, while petitioner executed the petition on "June 17, 1997." R1:1:6. The timeliness of the petition for writ of habeas corpus did not turn upon which of the above dates the petition was deemed filed.

district court for determination of which issues merit appeal under the amended requirements of 28 U.S.C. § 2253(c)." R1:23:2.

Petitioner thereafter filed a new application for COA with the district court, R1:26, which was denied on December 10, 1999. R1:27. Petitioner filed a new "Notice Of Appeal" on January 12, 2000, attempting to appeal the denial of COA. R1:28. The court of appeals treated the notice of appeal as an application for COA and dismissed the appeal on April 6, 2000. Thereafter, under the original appeal that had been dismissed without prejudice on October 28, 1999, petitioner submitted to the Eleventh Circuit a "Petition For Rehearing," on or about April 18, 2000, requesting that the court of appeals reconsider the denial of COA in that first appeal. The petition was returned to petitioner unfiled with a letter dated April 26, 2000.

Nearly sixteen months later, on August 2, 2001, petitioner filed his "Rule 60(b) Motion To Amend Or Alter Judgement." R1:33. In that motion, petitioner contended that the district court's order of dismissal should be vacated pursuant to Artuz v. Bennett, 531 U.S. 4 (2000) and Delancy v. Florida Department of Corrections, 246 F.3d 1328 (11th Cir. 2001). R1:33:6.[4] The district court denied the motion on March 5, 2002. R1:34.[5] Petitioner filed a "Notice Of Appeal" on April 9, 2002. R1:36.[6] The district court denied COA on May 14, 2002. R1:38.

---

[4]The State does not agree with petitioner's characterization of his Rule 60(b) motion as "establish[ing] that his original habeas corpus petition was erroneously dismissed as procedurally barred." See Petition, at 8. The State disputed this issue in the circuit court. En banc Brief of the Respondent-Appellee, at 45-49. In any event, the merits of that issue are not properly before this Court from the court of appeals' decision.

[5]The district court believed that it was without jurisdiction to entertain the motion on the basis that petitioner had already appealed to the Eleventh Circuit. R1:34.

[6]Pursuant to F.R.A.P. 4(a)(1)(A), petitioner's notice of appeal was due on April 4, 2002. (continued...)

Subsequently, on August 15, 2002, a judge of the court of appeals granted petitioner a COA on the following issue: "Whether the district court erred in dismissing appellant's habeas corpus petition, 28 U.S.C. § 2254, as barred by the one-year statute of limitations provision in the Antiterrorism and Effective Death Penalty Act of 1996." Following briefing by the parties, a panel of the court of appeals issued its opinion on January 10, 2003, whereupon it ruled that "[t]he certificate of appealability previously granted in this case is QUASHED AS IMPROVIDENTLY GRANTED, and the appeal is DISMISSED." Gonzalez v. Secretary for the Florida Dept. of Corrections, 317 F.3d 1308, 1314 (11th Cir. 2003), vacated and hearing en banc granted, 326 F.3d 1175 (11th Cir. 2003).

On January 27, 2003, petitioner filed a "Motion To Reconsider, Vacate, Or Modify" before the court of appeals. That motion was denied as moot, while that court, en banc, on April 1, 2003, issued its order directing that the case be heard en banc, in conjunction with the cases of Lazo v. United States, No. 02-12483, and Mobley v. Head, No. 02-14224.[7] Gonzalez, 326 F.3d at 1176. The parties in the three cases were directed to address the following issues:

---

[6](...continued)
Because petitioner purportedly placed his notice of appeal into the prison mail system on April 2, 2002, R1:36, his notice, though not filed in the district court until April 9, 2002, would be deemed timely. Houston, 487 U.S. at 267.

[7]See Lazo v. United States, 314 F.3d 571 (11th Cir.), vacated for rehearing en banc, 326 F.3d 1175 (11th Cir. 2003) and Mobley v. Head, 306 F.3d 1096 (11th Cir. 2002), vacated and hearing en banc granted, 326 F.3d 1175 (11th Cir. 2003) A petition for writ of certiorari has been filed in the Mobley case, assigned case number 04-6914 before this Court.

1) Is a certificate of appealability required before an appeal may be taken from the denial of a Rule 60(b) motion involving an order or judgment in a 28 U.S.C. 2255 [8] proceeding?

2) If so, should one issue in this case?

3) What standards or rules should govern Rule 60(b) motions involving an order or judgment in a 28 U.S.C. § 2255 proceeding, i.e., under what circumstances, if any, should such a motion be granted?

4) Was it an abuse of discretion for the district court to deny the Rule 60(b) motion in this case?

Subsequently, in a letter dated June 27, 2003, the court of appeals directed the parties to address the following issues by supplemental en banc letter briefs:

I. "To what extent if any, and how, should the general principles underlying habeas and section 2255 cases guide, and the provisions of AEDPA inform, the decision of whether the grant of Rule 60(b) relief relating to a habeas or section 2255 judgment is available, and if available, is an abuse of discretion?"; and

II. "By analogy to Calderon[v. Thompson, 523 U.S. 538 (1998)], and for the same or similar reasons, should this Court hold that, except in cases of actual fraud on the federal court which issued the judgment denying the habeas corpus petition or section 2255 motion, Rule 60(b) relief from judgment is available only 'to avoid a miscarriage of justice as defined by our habeas corpus jurisprudence."

The Eleventh Circuit heard individual oral argument in the three cases, then issued a consolidated opinion on April 26, 2004. Gonzalez, 366 F.3d 1253. Therein, the en banc court first held that a habeas petitioner must obtain a certificate of appealability in order to appeal an order denying a Rule 60(b) motion. Id. at 1263-1266. In respect to Gonzalez specifically, the court of appeals thereafter determined that he was entitled to a certificate of appealability, id. at 1268, and that his Rule 60(b)(6) motion constituted a successive petition, as he was "attacking the merits of

[8]Both Gonzalez and Mobley involved state prisoners that sought relief under 28 U.S.C. § 2254; Lazo pertained to a habeas petition filed by a federal prisoner under 28 U.S.C. § 2255.

that decision [denying his habeas petition]—the term 'merits' referring to the correctness of the decision itself even though the ground of this particular decision was the statute of limitations, an affirmative defense." Id. at 1281.

Respondent does not dispute that petitioner's contention in his first question presented was raised and decided by the United States Court of Appeals for the Eleventh Circuit. Petitioner's second question presented, however, was not an issue that the court of appeals requested the parties to address and was not discussed by that court in rendering its decision. Therefore, petitioner's second question should not be considered as properly raised in petitioner's request for certiorari review.[9]

[9]In the context of addressing the court of appeal's question whether a certificate of appealability should issue, petitioner argued the underlying merits of the issue raised in the Rule 60(b) motion, citing a procedural due process right to a first federal habeas petition. En banc Brief of the Appellant, at 17-32. That issue was not before the Eleventh Circuit. In respect to the second portion of petitioner's second question presented, in addition to not being before or decided by the court of appeals, petitioner did not present the argument now made before this Court. Instead, petitioner only addressed the Suspension Clause in the context of his due process argument, disavowing any relevance there. Id. at 27 n.5 ("Some would argue that the right to habeas corpus derives, independent of statute, from the Suspension Clause of U.S. Const. Art. I, sec. 9, but that argument is irrelevant to the right of procedural due process applicable here.").

REASONS FOR DENYING THE WRIT

I. The United States Court of Appeals for the Eleventh Circuit properly determined that a Rule 60(b) motion seeking to reopen a final judgment decided on the merits in a federal habeas proceeding, on the basis that the disposition of that habeas petition was erroneous, constituted a successive petition subject to the requirements of 28 U.S.C. § 2244(b).

A. There is no significant split among the circuit courts of appeal.

Under subsection A of his first question presented, petitioner asserts that "the federal circuits remain sharply divided on the availability of Fed. R. Civ. P. 60(b) motions to challenge the integrity of final orders entered in habeas corpus proceedings." Petition, at 9-10. To the contrary, by overgeneralizing the issue before this Court, petitioner both misstates the current status of the law and fails to limit his discussion to the issue that the Eleventh Circuit decided in his case -- i.e., whether a Rule 60(b) motion could be used to reopen for reconsideration an issue upon which the habeas petition was adjudicated to final disposition on the merits. Considered accordingly, certiorari review is not warranted.

Rule 60(b) motions brought in the context of a petition for writ of habeas corpus under 28 U.S.C. § 2254 or § 2255 generally fall into one of three categories: those attempting to either relitigate or raise new claims challenging the conviction and/or sentence, those alleging some infirmity in the habeas proceedings, and those seeking review of a habeas denial upon a procedural basis. The Eleventh Circuit's Gonzalez opinion, individually addressing the distinct factual situations presented by the individual habeas petitioners, illustrates this practice. Id. at 1268 (Lazo - constitutional claim), 1282 (Mobley - alleged fraud on the district court), 1281-1282 (Gonzalez - dismissal as untimely). Thus petitioner's characterization of the court of appeals' decision as a "bright line holding," Petition, at 12, is inaccurate.

The vast majority of Rule 60(b) motions in the context of a habeas proceeding seek to relitigate previously raised or new claims attacking the judgment of conviction and/or sentence. Under those circumstances, the circuit courts of appeal are in full agreement that a Rule 60(b) motion in actuality is a successive petition subject to 28 U.S.C. § 2244(b). See, e.g., Munoz v. United States, 331 F.3d 151 (1st Cir.), cert. denied, 124 S.Ct. 587 (2003); Rodwell v. Pepe, 324 F.3d 66, 70 (1st Cir.), cert. denied, 124 S.Ct. 224 (2003); Harris v. United States, 367 F.3d 74, 82 (2nd Cir. 2004); Gitten v. United States, 311 F.3d 529, 534 (2nd Cir. 2002); United States v. Edwards, 309 F.3d 110, 112-113 (3rd Cir. 2002); United States v. Winestock, 340 F.3d 200, 206 (4th Cir.), cert. denied, 124 S.Ct. 496 (2003); United States v. Rich, 141 F.3d 550, 551 (5th Cir. 1998), cert. denied, 526 U.S. 1011 (1999); In re Abdur'Rahman, 2004 U.S. App. LEXIS 25609 *17-18 (6th Cir. Dec. 13, 2004) (en banc); Dunlap v. Litscher, 301 F.3d 873, 875 (7th Cir. 2002), cert. denied, 539 U.S. 962 (2003); Blackmon v. Armontrout, 2003 U.S. App. LEXIS 4332 *1 (8th Cir. Mar. 12, 2003) (unpublished), cert. denied, 124 S.Ct. 120 (2003); Boyd v. United States, 304 F.3d 813, 814 (8th Cir. 2002) (per curiam), cert. denied, 538 U.S. 953 (2003); Thompson v. Calderon, 151 F.3d 918, 921 (9th Cir.), cert. denied, 524 U.S. 965 (1998); Ortiz v. Stewart, 195 F.3d 520 (9th Cir. 1999) (per curiam); Lopez v. Douglas, 141 F.3d 974, 975 (10th Cir.) (per curiam), cert. denied, 525 U.S. 1024 (1998); Gonzalez, 366 F.3d at 1277; Felker v. Turpin, 101 F.3d 657, 660-662 (11th Cir.) (per curiam), cert. denied, 519 U.S. 989 (1996).[10]

---

[10]Moreover, these decisions are consistent with those cases holding prior to the enactment of the Anti-terrorism and Effective Death Penalty Act (hereinafter "AEDPA") that a Rule 60(b) motion could not be used to avoid application of the abuse of the writ doctrine. See, e.g., Hunt v. Nuth, 57 F.3d 1327, 1339 (4th Cir. 1995), cert. denied, 516 U.S. 1054 (1996); Williams v. Whitley, 994 F.2d 226, 230 n.2 (5th Cir.), cert. denied, 510 U.S. 1014 (1993); McQueen v. Scroggy, 99 F.3d 1302, 1335 (6th Cir. 1996), cert. denied, 520 U.S. 1257 (1997), overruled on other grounds, In re
(continued...)

In relation to the treatment of Rule 60(b) motions seeking review of the constitutionality of the conviction and/or sentence, petitioner's attempt to demonstrate a widespread split among the circuits is superfluous. Petitioner erroneously characterizes the holdings of the Sixth and Tenth Circuits as taking an "extreme position." See Petition, at 13. According to petitioner, both McQueen v. Scroggy, 99 F.3d 1302 (6th Cir. 1996) (pre-AEDPA), cert. denied, 520 U.S. 1257 (1997) and Lopez v. Douglas, 141 F.3d 974 (10th Cir.) (per curiam), cert. denied, 525 U.S. 1024 (1998) stand for the proposition "that regardless of the substance of the allegations, a Rule 60(b) motion is always a second or successive habeas petition under AEDPA." Petition, at 13. To the contrary, both courts had before them Rule 60(b) motions challenging the underlying conviction and determined that the abuse of the writ doctrine or AEDPA precluded consideration. McQueen, 99 F.3d at 1335; Lopez, 141 F.3d at 975, respectively. In McQueen, the Rule 60(b) motion "raised broad allegations of constitutional violations. . . . [that were] never included in the initial petition." Id., 99 F.3d at 1335. In holding the motion to be a successive petition, the Sixth Circuit cited cases similarly addressing the propriety of raising challenges to the judgment of conviction and/or sentence in a Rule 60(b) motion. Id. Moreover, to the extent that McQueen could have been interpreted as adopting an all-or-nothing approach -- i.e., that a Rule 60(b) motion is always successive and thus subject to the abuse of the writ doctrine -- the Sixth Circuit has recently clarified its position,

---

[10](...continued)
Abdur'Rahman, 2004 U.S. App. LEXIS 25609 *18; Gant v. United States, 1993 U.S. App. LEXIS 26819 *2-3 (7th Cir. Oct. 7, 1993) (unpublished), cert. denied, 510 U.S. 1183 (1994); Blair v. Armontrout, 976 F.2d 1130, 1134 (8th Cir. 1992), cert. denied, 508 U.S. 916 (1993); Bonin v. Vasquez, 999 F.2d 425, 428 (9th Cir. 1993); Lindsey v. Thigpen, 875 F.2d 1509, 1511-1512, 1515 (11th Cir. 1989). These pre-AEDPA decisions applied Rule 9(b) of the Rules Governing Section 2254 Cases (effective 1977), which incorporates the Court's prior decisions on successive petitions and abuse of the writ. Slack v. McDaniel, 529 U.S. 473, 486 (2000).

adopting a "functional approach." In re Abdur'Rahmon, 2004 U.S. App. LEXIS 25609 *18.[11] Similarly, the Rule 60(b) motion in Lopez sought reconsideration of a substantive claim raised in the habeas petition, one of ineffective assistance of trial counsel, which has been treated as a successive petition by all the courts of appeal. In holding that § 2244(b) applied, the Tenth Circuit cited to the Seventh Circuit's opinion in Burris v. Parke, 130 F.3d 782 (7th Cir.), cert. denied, 522 U.S. 990 (1997). See Lopez, 141 F.3d at 975. Burris held that a motion to recall the mandate seeking to relitigate a claim of ineffective assistance of counsel or to raise a new constitutional challenge to the conviction must be treated as a successive petition. Id., 130 F.3d at 785. Thus it simply is an overstatement to characterize the decisions of the Sixth and Tenth Circuits, as well as the Eleventh Circuit, as holding that a Rule 60(b) motion is always a successive petition for purposes of AEDPA.

Rule 60(b) motions are also brought to challenge the integrity of the judgment on a habeas petition, alleging, for example, fraud upon the district court.[12] Where the integrity of the judgment is implicated, the circuit courts have indicated that a Rule 60(b) motion would be the proper vehicle for raising the claim. See, e.g., Rodwell, 324 F.3d at 70; Harris, 367 F.3d at 82; Rodriguez v.

---

[11]The functional approach entails consideration of the factual allegations raised in the motion and whether it falls within the parameters of Rule 60(b) generally. This approach, while recognizing the distinction between claims raising constitutional issues brought in § 2254 and § 2255 petitions, the integrity of the district court's judgment, and final disposition on procedural grounds, ignores the import of congressional intent in respect to federal habeas and the limits placed thereon and this Court's habeas jurisprudence.

[12]As discussed infra, at 19, a decision interpreting a procedural rule subsequent to the denial of habeas relief, where the earlier denial could be deemed erroneous upon retroactive application of that new decision, does not implicate the integrity of those prior proceedings. But see In re Abdur'Rahman, 2004 U.S. App. LEXIS 25609 *18. Review of the Sixth Circuit's decision there, however, reflects that that court gave no consideration to the distinction between a dismissal upon a technical procedural ground and an adjudication on the merits resting upon a procedural basis.

Mitchell, 252 F.3d 191, 199 (2nd Cir. 2001); Winestock, 340 F.3d at 20; United States v. MacDonald, 1998 U.S. App. LEXIS 22073 *8-9 (4th Cir. Sept. 8, 1998) (unpublished); Dunlap, 301 F.3d at 875; In re Abdur' Rahman, 2004 U.S. App. LEXIS 25609 *18; Thompson, 151 F.3d at 921 n.3; Gonzalez, 366 F.3d at 1278; but see United States v. Bey, 2004 U.S. App. LEXIS 23915 *8-9 (10th Cir. Nov. 16, 2004) (unpublished) (ruling without analysis that a Rule 60(b) motion alleging fraud is subject to 28 U.S.C. § 2244(b), and citing circuit precedent, Lopez, 141 F.3d at 975, which presented only the situation of a petitioner seeking to raise a constitutional challenge to his conviction through a Rule 60(b) motion and holding that it was successive).

As to these type of claims, petitioner asserts that the opinion of the Second Circuit in Harris v. United States, 367 F.3d 74 (2nd Cir. 2004) further "reinforced" the conflict among the circuits. Petition, at 13. To the contrary, petitioner's conclusion is based upon a misapprehension of the Gonzalez opinion. As previously stated, supra, at 8, the court of appeals identified three distinct types of claims raised in the Rule 60(b) motions filed by Lazo, Mobley, and Gonzalez. Just as the Eleventh Circuit did with Mobley's motion, the Second Circuit, relying upon circuit precedent, recognized that an attack to the integrity of the habeas proceeding may be raised in a Rule 60(b) motion while an attack to the conviction may be treated as a successive petition. Harris, 367 F.3d at 82. The petitioner in Harris had claimed that his *habeas* counsel had been ineffective, id. at 76, thus "arguably attack[ing] the integrity of Harris's habeas proceeding" so that the merits of the Rule 60(b) motion could be reached. Id. at 80; see also Reid v. Angelone, 369 F.3d 363, 375 (4th Cir. 2004) (propriety of refusal to permit withdrawal of habeas petition for exhaustion of state court

remedies subject to Rule 60(b) review). Viewed in respect to the characterization of the type of claim raised, there is no meaningful conflict.[13]

Turning to the last categorical basis for which a Rule 60(b) motion typically is filed in the context of a federal habeas proceeding -- the case of a *denial* of the petition upon a procedural basis[14] -- the Eleventh Circuit in Gonzalez's case held that based upon the passage of AEDPA, specifically § 2244(b), and the reasoning of Calderon v. Thompson, 523 U.S. 538 (1998), use of Rule 60(b) to challenge a determination of untimeliness was precluded. Gonzalez, 366 F.3d at 1281-1282.

As with pre-AEDPA cases addressing Rule 60(b) motions raising challenges to the conviction and/or sentence, Gonzalez is also consistent with both pre-AEDPA and post-AEDPA cases holding that the denial or termination of a habeas petition on procedural default grounds is a ruling on the merits for purposes of evaluating whether a subsequent pleading is a successive petition. See, e.g., Harvey v. Horan, 278 F.3d 370, 379-380 (4th Cir. 2002); In re: Cook, 215 F.3d

---

[13]As previously observed, supra, at 12, while the Tenth Circuit held in an unpublished opinion that a claim of fraud in a Rule 60(b) motion presents a successive petition, Bey, 2004 U.S. App. LEXIS 23915 *8-9, that court cited circuit precedent, Lopez, 141 F.3d at 975, which had used broad language in holding that a motion seeking reconsideration of a constitutional challenge to the petitioner's conviction was successive.

[14]A *dismissal* on procedural grounds, i.e., a resolution on a technical basis, presents a distinct matter and does not raise the same interests in finality as an actual denial, i.e., final or merits disposition of a habeas petition. The reason for this distinction is that while a technical procedural defect can be remedied and anticipates subsequent litigation upon the underlying claims, a denial on procedural grounds forecloses further litigation of those underlying claims. Thus dismissal on technical grounds does not subject a subsequent petition to the requirements of 28 U.S.C. § 2244(b). See Stewart v. Martinez-Villareal, 523 U.S. 637, 643-645 (1998) (issue raised in first petition was not ripe for review); Slack, 529 U.S. at 473, 485-486 (dismissal for lack of exhaustion of state court remedies). Accordingly, as discussed infra, at 16-17, the court of appeals' resolution in Gonzalez is consistent with Stewart and Slack.

606, 607-608 (6th Cir. 2000)[15]; Carter v. United States, 150 F.3d 202, 205-206 (2nd Cir. 1998); Hawkins v. Evans, 64 F.3d 543, 547 (10th Cir. 1995); Bates v. Whitley, 19 F.3d 1066, 1067 (5th Cir. 1994); Howard v. Lewis, 905 F.2d 1318, 1322-1323 (9th Cir. 1990). Accord Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 228 (1995) ("The rules of finality, both statutory and judge made, treat a dismissal on statute-of-limitations grounds the same way they treat a dismissal for failure to state a claim, for failure to prove substantive liability, or for failure to prosecute: as a judgment on the merits.").

Gonzalez comports with this Court's recognition that while "habeas corpus proceedings are characterized as 'civil' . . . . the label is gross and inexact." Harris v. Nelson, 394 U.S. 286, 293-294 (1969). Unlike civil proceedings not arising under a special statutory grant of authority, a habeas corpus petition attacking a state judgment of conviction and sentence as violative "of the Constitution or laws or treaties of the United States," 28 U.S.C. § 2254(a), is subject to qualification. For example, a ground for relief in a habeas petition that was not properly raised in state court is subject to denial as procedurally defaulted unless the petitioner has a non-futile state court remedy to raise the claim, or can establish cause and actual prejudice or a fundamental miscarriage of justice in order to avoid the procedural default. Schlup v. Delo, 513 U.S. 298, 314-315 (1995); cf. Bousley v. United States, 523 U.S. 614, 622 (1998) (applying the procedural bar rule in the context of a § 2255 petition). Moreover, the draftsmen of the Federal Rules of Civil Procedure intended "that the rules would have very limited application in habeas corpus proceedings." Harris, 394 U.S. at 295.

---

[15]The majority in In re Abdur'Rahman, 2004 U.S. App. LEXIS 25609 fails to address this principle that a denial on procedural grounds is a final adjudication and its own precedent so holding, citing Cook solely for the proposition that an unexhausted claim is deemed procedurally defaulted where the petitioner cannot return to state court to properly exhaust the claim. In re Abdur'Rahman, id. at *9.

Just as Rules 26 and 33 of the Federal Rules of Civil Procedure do not completely and automatically apply in habeas proceedings, Harris, 394 U.S. at 295-298, unfettered use of Rule 60(b) is similarly "ill-suited to the special problems and character of [habeas] proceedings." Id. at 296. And for any claim raised in a Rule 60(b) motion, the petitioner, prior to passage of AEDPA and where the motion was not an abuse of the writ, was required to first exhaust his or her state court remedies under 28 U.S.C. § 2254(b). Pitchess v. Davis, 421 U.S. 482, 489-490 (1975). Such limits on habeas corpus litigation reflect the Court's "respect for the State's interest in the finality of convictions that have survived direct review within the state court system," and recognize that "[f]inality is essential to both the retributive and the deterrent functions of criminal law." Calderon v. Thompson, 523 U.S. 538, 555 (1998) (internal citation and quotation marks omitted). The fact that this was Gonzalez's first petition is irrelevant; section 2254 does not give rise to an absolute right to consideration of substantive claims, as such review is conditional upon satisfaction of § 2244(d) as well as the requirement that a claim must have been properly presented before the state courts.

Moreover, Congress has expressly provided for the differential treatment of habeas corpus proceedings and ordinary civil actions. Rule 1 of the Federal Rules of Civil Procedure provides in pertinent part that "[t]hese rules govern the procedure in the United States district courts in all suits of a civil nature . . . *with the exceptions stated in Rule 81. . . .*" (emphasis added). Under Rule 81(a)(2), "[t]hese rules [the Federal Rules of Civil Procedure] are applicable to proceedings for . . . habeas corpus . . . to the extent that the practice in such proceedings *is not set forth in statutes of the United States* and has heretofore conformed to the practice in civil actions." (emphasis added). Additionally, Rule 11 of the Rules Governing Section 2254 Cases (effective 1977), provides that "[t]he Federal Rules of Civil Procedure, *to the extent that they are not inconsistent with these Rules*,

may be applied, when appropriate, to petitions filed under these rules." (emphasis added). The Eleventh Circuit's decision in Gonzalez simply effectuates the "'gatekeeping' mechanism for the consideration of 'second or successive habeas corpus applications' in the federal courts" established by Congress through 28 U.S.C. § 2244(b). See Stewart, 523 U.S. at 641; Felker v. Turpin, 518 U.S. 651, 657 (1996).

Because a determination that the underlying constitutional claims are not subject to review due to procedural grounds, i.e., the claims are procedurally defaulted or the petition is time-barred, constitutes a ruling on the merits, petitioner's reliance upon Stewart v. Martinez-Villareal, 523 U.S. 637 (1998) and Slack v. McDaniel, 529 U.S. 473 (2000), Petition, at 19, 21, is misplaced. In Stewart, this Court held that a habeas petition dismissed without prejudice on the basis that a claim was premature did not constitute adjudication of the claim to preclude its reassertion. Id., 523 U.S. at 644-645. Similarly, in Slack, a dismissal without prejudice because the substantive claims had not been exhausted in state court did not constitute a ruling on the merits such that their reassertion would be successive. Id., 529 U.S. at 486-487. Those circumstances are quite distinct from an adjudication finally disposing of a petition on procedural grounds that forecloses review of the underlying constitutional claims. Compare Sanders v. United States, 373 U.S. 1, 19 (1963) (dismissal based upon deficient pleading did not bar subsequently filed § 2255 petition). This Court's opinions in Stewart, Slack, and Sanders implicitly recognize the principle that not every adjudication of a habeas petition on procedural grounds is a technical ruling; otherwise there would

have been no reason for the Court to consider whether there had been an adjudication of the merits of the petitions at issue in those cases.[16]

Respondent recognizes that resolution of the issue whether a Rule 60(b) motion challenging the final disposition of a habeas petition on procedural grounds has not been consistent among a limited number of the circuit courts of appeal considering the matter. The differing treatment does not, however, warrant certiorari review at this time.

In Pridgen v. Shannon, 380 F.3d 721 (3rd Cir. 2004), pet. for cert. filed (10/29/04) (No. 04-7060), the Third Circuit Court of Appeals considered a claim as to whether a challenge brought in a Rule 60(b) motion based upon newly discovered evidence and application of § 2244(d)(2) was successive or could be considered on the merits. Id. at 722. While the Third Circuit adopted the approach taken by every other circuit holding that an attempt to relitigate underlying constitutional claims implicated § 2244(b), id., the court there concluded that the timeliness issue was properly considered under Rule 60(b). Id. at 727-728. The scope of that court's analysis, however, is limited, relying in conclusory fashion upon the fact that the challenge was "an attack on the habeas proceeding" because Pridgen alleged "that the District Court misinterpreted Pennsylvania law and AEDPA." Id. at 18.

---

[16]In addition to his citation to Slack and Stewart, petitioner's reliance upon Muniz v. United States, 236 F.3d 122 (2nd Cir. 2001) on this issue is misplaced. Muniz involved review of an application to file a successive petition. In the course of deciding whether petitioner was required to make such a request, the Second Circuit improperly treated a dismissal pursuant to § 2244(d) as a "technical procedural" defect and was particularly concerned that the habeas petitioner there, through filing an application for a certificate of appealability, had sought a timely appeal asserting an erroneous determination under § 2244(d), wherein application of two decisions that had been released by the appellate court *after the petition was dismissed but within the time for appeal* would have resulted in the petition being deemed timely filed. Muniz, id. at 128.

On December 13, 2004, the Sixth Circuit en banc issued its opinion in In re Abdur'Rahman, addressing whether a Rule 60(b) motion is a proper vehicle for raising a challenge to a habeas denial based upon a procedural bar. Id., 2004 U.S. App. LEXIS 25609. Review of the 7-6 majority opinion, however, reflects that no consideration was given to this Court's decisions in Calderon, Slack, or Stewart.

The Ninth Circuit Court of Appeals, in Hamilton v. Newland, 374 F.3d 822 (9th Cir. 2004), considered whether a claim of actual innocence could properly be raised in a Rule 60(b) motion where the habeas petition had been rejected as untimely. In concluding that the motion was not a second or successive petition, the court there neglected to provide any analysis in asserting that "Rule 60(b) is the appropriate rule to invoke when one wishes a court to *reconsider claims it has already decided*." Id. at 825 (emphasis added).

Thus to date, then, only two other circuit courts of appeal have addressed the precise issue presented in Gonzalez's Rule 60(b) motion, that being the correctness of the determination as to timeliness of the habeas petition, and in permitting consideration of the motions, neither provided any analysis to support its decision. Just as the circuit courts of appeal, subsequent to this Court's dismissal of Abdur'Rahman v. Bell, id., 537 U.S. 88 (2002), have rejected the all-or-nothing approach previously discerned in some opinions, it is likely that further analysis by the majority of circuits will clarify the appropriate treatment of Rule 60(b) motions in the context of a denial of a habeas petition on procedural grounds without this Court's review. And given the limited instances in which the issue has arisen, there is not the conflict on an important matter as contemplated under Rule 10 of the Rules of the Supreme Court of the United States.

B. Gonzalez does not conflict with Supreme Court precedent.

Petitioner's argument in subsection B of his first question presented, Petition, at 16-27, also does not warrant this Court's discretionary review, as it simply is not the case that Gonzalez established a "bright-line prohibition of Rule 60(b)(6) jurisdiction in habeas corpus cases. . . ." Petition, at 16. See supra, at 8. Moreover, the Eleventh Circuit's analysis comports with this Court's precedent and the mandate of Congress in its enactment of AEDPA. Slack and Stewart do not compel a result contrary to that reached by the Eleventh Circuit. Compare Petition, at 17-19. As discussed supra, at 16-17, there is a distinction between a procedural dismissal anticipating subsequent resolution of the underlying constitutional challenges to a conviction and/or sentence -- nonexhaustion or that the challenge is not ripe for review -- versus a procedural disposition thereupon precluding review of those underlying claims at any time -- untimeliness of the petition or denial of a claim due to a procedural bar.

The fact that a decision of this Court interpreted 28 U.S.C. § 2244(d)(2) differently from prior opinions of the lower courts does not demonstrate an infirmity in the habeas proceedings. Instead, and at most, the complaint is that the district court should have applied § 2244(d)(2) differently because its understanding of the procedural statute turned out to be contrary to this Court's subsequent interpretation. Accordingly, petitioner's claim of entitlement to review of the underlying claims attacking his judgment of conviction and/or sentence following this Court's opinion in Artuz v. Bennett, 531 U.S. 4 (2000) -- the decision upon which his 60(b) motion relied -- is without merit.[17] His recourse to challenge an alleged erroneous application of law was to file a petition for writ of

---

[17]As discussed supra, at 4 n.4, the State disputed the timeliness of Gonzalez's petition irrespective of the applicability of Artuz.

certiorari from the denial of COA upon the habeas petition. A number of habeas petitioners sought such relief from this Court both prior to and subsequent to the grant of certiorari in Artuz. See, e.g., Boufford v. Moore, 532 U.S. 1050 (2001) (Mem.); Hayes v. Mills, 532 U.S. 1015 (2001) (Mem.); Banes v. Moore, 532 U.S. 1005 (2001) (Mem.); Brown v. Moore, 532 U.S. 968 (2001) (Mem.); Weekley v. Moore, 531 U.S. 1063 (2001) (Mem.); Cohen v. Grant, 531 U.S. 988 (2000) (Mem.); Guerroero v. Terhune, 531 U.S. 988 (2000) (Mem.); Moreland v. Lazaroff, 531 U.S. 988 (2000) (Mem.); Weatherspoon v. Moore, 531 U.S. 988 (2000) (Mem.); Tinker v. Hanks, 531 U.S. 987 (2000) (Mem.). In fact, each of the above-listed petitioners whose cases originated in the Eleventh Circuit[18] filed for certiorari prior to that court's decision applying Artuz, see Delancy v. Florida Dept. of Corrections, 246 F.3d 1328 (11th Cir. 2001), thus demonstrating that Gonzalez also could have sought further review without awaiting this Court's decision in Artuz interpreting § 2244(d)(2). A Rule 60(b) motion is not a substitute for appeal. Ackermann v. United States, 340 U.S. 193, 202 (1950); see also Polites v. United States, 364 U.S. 426, 431-433 (1960) (decision not to appeal generally cannot be circumvented by seeking Rule 60(b) relief; not deciding whether an alleged change in the interpretation of *substantive* law permits Rule 60(b) consideration where the prior opportunity to appeal was abandoned).

If, however, a Rule 60(b) motion is proper to seek relitigation upon a subsequent interpretation of a procedural rule, wherein the former interpretation of that rule had previously resulted in a final adjudication of a habeas petition, the underlying judgment of conviction and/or sentence potentially would never be accorded finality. That is, such disregard for AEDPA renders a prior adjudication in a habeas proceeding vulnerable to post-judgment attack vis-a-vis Rule 60(b)

[18]Those petitioners included Banes, Boufford, Brown, Weatherspoon, and Weekley.

any time a different interpretation of a procedural rule is announced, irrespective of the time period that had elapsed since denial of the § 2254 petition. Obviously the requirement of challenging a denial on procedural grounds from a final judgment through a timely appeal would be eviscerated, or alternatively, would provide the habeas petitioner with a second opportunity for review and in the process circumvent § 2253(b). Moreover, in light of Congress' inclusion of a statute of limitations with a very limited provision for the running of the one-year period upon creation of a new constitution right and an equally narrow exception for bringing a successive petition under the same circumstances, it is incredulous that Congress intended that a habeas petitioner have greater rights in respect to a procedural rule of law.

Thus if a Rule 60(b) motion may be used to raise a subsequent interpretation of § 2244(d)(2) following issuance of Artuz v. Bennett, then logically the same would be true upon the Court's forthcoming decision in Pace v. DiGuglielmo, 125 S.Ct. 26 (Sept. 28, 2004) (No. 03-9627), a case involving further interpretation of § 2244(d)(2), concerning the filing of untimely state collateral applications. Cases that could well see the filing of a Rule 60(b) motion if the Court were to conclude that the time is tolled upon the filing of an untimely state petition, would include, for example: Williams v. Sims, 2004 U.S. App. LEXIS 24751 (7th Cir. Dec. 1, 2004); Wade v. Battle, 379 F.3d 1254 (11th Cir. 2004); Merritt v. Monroe, 326 F.3d 157 (3rd Cir.), cert. denied, 540 U.S. 921 (2003); Siebert v. Campbell, 334 F.3d 1018 (11th Cir. 2003); Stafford v. Thompson, 328 F.3d 1302 (11th Cir. 2003); Johnson v. Wolfe, 41 Fed. Appx. 733 (6th Cir. Jun. 21, 2002) (unpublished); Brooks v. Walls, 301 F.3d 839 (7th Cir. 2002), cert. denied, 538 U.S. 1001 (2003); Wright v. Norris, 299 F.3d 926 (8th Cir. 2002); Allen v. Mitchell, 276 F.3d 183 (4th Cir. 2001); Israfil v. Russell, 276 F.3d 768 (6th Cir. 2001), cert. denied, 535 U.S. 1088 (2002); Williams v. Cain, 217 F.3d 303 (5th

Cir. 2000); Morgan v. Money, 2000 U.S. App. LEXIS 1914 (6th Cir. Feb. 8, 2000) (unpublished); Hernandez v. Peirson, 2000 U.S. App. LEXIS 30179 (7th Cir. Nov. 22, 2000) (unpublished), cert. denied, 532 U.S. 1068 (2001); Freeman v. Page, 208 F.3d 572 (7th Cir.), cert. denied, 531 U.S. 946 (2000); Romaine v. Woods, 2000 U.S. App. LEXIS 18606 (9th Cir. Jul. 26, 2000) (unpublished); Webster v. Moore, 199 F.3d 1256 (11th Cir., cert. denied, 531 U.S. 991 (2000); Palmer v. Corcoran, 1999 U.S. App. LEXIS 23336 (4th Cir. Sept. 24, 1999) (unpublished); Kiel v. Scott, 1999 U.S. App. LEXIS 2500 (10th Cir. Feb. 18, 1999) (unpublished)), cert. denied, 528 U.S. 1115 (2000); Conner v. Lemaster, 1999 U.S. App. LEXIS 2495 (10th Cir. Feb. 18, 1999) (unpublished). The foregoing list is without consideration of those district court § 2244(d) dismissals in which a certificate of appealability was not obtained.

Petitioner's reliance upon Blackmon v. Money, 27 Fed. Appx. 543 (6th Cir. Dec. 10, 2001) (unpublished) and Thomas v. Roe, 23 Fed. Appx. 847 (9th Cir. Dec.27, 2001) (unpublished), Petition, at 20, wherein consideration of the propriety of dismissing a habeas petition as untimely under § 2244(d) was permitted under Rule 60(b) following Artuz v. Bennett, 531 U.S. 4 (2000), is misplaced. In neither case does it appear that the successive nature of the Rule 60(b) motion was raised nor addressed. Thus these cases are inapposite.

Similarly, petitioner's citation to another unpublished opinion, Guyton v. United States, 23 Fed. Appx. 539 (7th Cir. Sept. 26, 2001) (unpublished), does not support application of Rule 60(b) under the circumstances of an alleged error of law. Instead, in dicta, the Seventh Circuit stated that "[h]ad Guyton filed his Rule 60(b) motion in the district court within the one-year limitation in that rule, the district court *probably* could have corrected its own error." Id. at 540 (emphasis added). In that case, as stated by the appellate court, the petitioner had "pursuant to 28 U.S.C. § 2255 and

Federal Rule of Civil Procedure 60(b) . . . filed a second petition *nunc pro tunc*." Id. at 539. Thus the issue herein presented was not before the court in Guyton.

Nor does petitioner's reliance upon unpublished district court cases, Tal v. Miller, 1999 U.S. Dist. LEXIS 652 (S.D.N.Y. Jan. 11, 1999) (unpublished) and Reinoso v. Artuz, 1999 U.S. Dist. LEXIS 7768 (S.D.N.Y. Apr. 14, 1999) (unpublished), Petition, at 21, call into question the Eleventh Circuit's reasoning. In each of those decisions a Rule 60(b) motion provided a mechanism for application of new decisional law to reinstate a habeas petition previously dismissed as untimely. The reasoning in Tal, relied upon in Reinoso, actually necessitates the contrary result reached in those decisions in light of this Court's opinion in Calderon. That is, the court in Tal looked to the purpose behind Rule 60(b)(6), that it "is to be 'liberally construed when substantial justice will thus be served' and the motion is to be granted when 'there are extraordinary circumstances . . . or where the judgment may work an extreme and undue hardship,'" Tal, 1999 U.S. Dist. LEXIS 652 *3 (internal citation omitted) -- the same basis upon which appellate courts may recall their mandates -- and relying upon pre-Calderon case law, *approved the use of Rule 60(b) analogizing with a federal appellate court's power to recall its mandate*. Id. (citing Sargent v. Columbia Forest Prods., 75 F.3d 86, 89 (2nd Cir. 1996) (emphasis added)). As discussed infra, at 24, Calderon requires the contrary result. Further, the district court's conclusion that the Rule 60(b) motion was not successive erroneously rested upon its rejection of the rule that a dismissal for untimeliness is an adjudication on the merits, instead stating that it was "more akin to a subsequent petition after state court remedies have been exhausted." Tal, id. at *9.

In addition, petitioner's argument that the circuit court "[o]verlook[ed] Congressional silence on Rule 60(b) . . . ." Petition, at 22, neither addresses the applicability of Rules 1 and 81(a)(2) of the

Federal Rules of Civil Procedure, see supra, at 15, nor recognizes that the same certainly could be said in respect to pre-AEDPA treatment of Rule 60(b) and whether a habeas petitioner was required to exhaust his state court remedies before seeking 60(b) relief -- a position rejected by this Court. Pitchess, 421 U.S. at 489-490. That is, notwithstanding that "Rule [60(b)] does not by its terms speak to the requirement of exhaustion of remedies as a prerequisite for federal habeas relief. . . . [t]he exhaustion requirement, *Picard v. Connor, 404 U.S. at 276*, is statutorily incorporated in *28 U.S.C. §§ 2254* (b) and (c) . . . ." and thus pursuant to Rule 81(a)(2), any claim raised in a 60(b) motion must meet the exhaustion requirement. Id.

Finally, petitioner's argument that the circuit court should not have applied Calderon v. Thompson, 523 U.S. 538 (1998), Petition, at 23-24, does not compel discretionary review. Petitioner ignores the fact that a motion to recall an appellate mandate and a Rule 60(b) motion similarly are limited to addressing extraordinary circumstances. See Calderon, 523 U.S. at 550 (motion to recall the mandate); Plaut, 514 U.S. at 233 (Rule 60(b) motion). And in addition to the Eleventh Circuit, Gonzalez, 366 F.3d at 1272-1277, other circuit courts of appeal, adopting the logic in Calderon, have followed suit in the context of Rule 60(b) motions seeking review of the denial of a habeas petition. See, e.g., Winestock, 340 F.3d at 206; Buell v. Anderson, 48 Fed. Appx. 491, 495 n.2 (6th Cir. Sept. 24, 2002) (unpublished); Dunlap, 301 F.3d at 875. That determination is not an aberration, as a Rule 60(b) motion has been viewed as equivalent to a motion to recall the mandate. See, e.g., Sargent, 75 F.3d at 89; Burris, 130 F.3d at 783; Gonzalez, 366 F.3d at 1276-1277.

In summary, as demonstrated above, the circuits have taken a case-by-case approach, looking to what categorical type of claim the Rule 60(b) motion raises upon which the habeas petitioner seeks to reopen a final judgment. Simply put, there is not the extent of the conflict that could

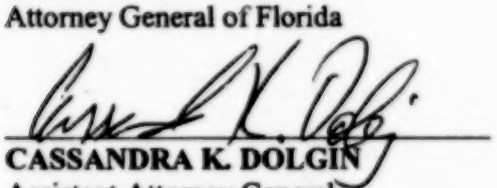
previously have been perceived. Thus this Court's prior grant of a writ of certiorari on the issue, see Abdur'Rahman v. Bell, 535 U.S. 1016 (2002), and relied upon petitioner, Petition, at 10-11, does not support discretionary review in this case. Rather, the circuit courts of appeal continue to refine their discussion of and have clarified the manner in which Rule 60(b) motions are to be treated when brought in habeas corpus proceedings. In respect to the propriety of a Rule 60(b) motion upon a denial on the merits based on a procedural rule specific to habeas corpus jurisprudence, the circuits should be permitted continued consideration of the issue. Based upon the foregoing, the Eleventh Circuit's Gonzalez opinion does not warrant granting a writ certiorari. The petition should, accordingly, be denied. Rules of the Supreme Court of the United States, Rule 10.

CONCLUSION

Based on the foregoing arguments and authorities, Respondent respectfully requests that this Honorable Court deny Petitioner's request for certiorari review.

Respectfully Submitted,

CHARLES J. CRIST, JR.
Attorney General of Florida



CASSANDRA K. DOLGIN
Assistant Attorney General
Counsel of Record

Office of the Attorney General
The Capitol
Tallahassee, FL 32399-1050
(850) 414-3579
(850) 487-0997 (fax)

Attorneys for Respondent

DISTRIBUTED
JAN 3 2005

ORIGINAL

Supreme Court, U.S.
FILED
DEC 29 2004
OFFICE OF THE CLERK

NO: 04-6432

IN THE
SUPREME COURT OF THE UNITED STATES

AURELIO O. GONZALEZ,

Petitioner,

v.

SECRETARY FOR THE DEPARTMENT OF CORRECTIONS,
James Crosby, Secretary,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

KATHLEEN M. WILLIAMS
Federal Public Defender
PAUL M. RASHKIND, Supervisory
Assistant Federal Public Defender
Chief of Appeals
Counsel for Petitioner
150 West Flagler Street, Suite 1500
Miami, Florida 33130-1555
Telephone (305) 536-6900

RECEIVED
JAN 3 - 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

REPLY ARGUMENT 1

I. Whether the Court of Appeals Erred in Holding That Every Rule 60(b) Motion (Other than for Fraud under (b)(3)) Constitutes a Prohibited "Second or Successive" Petition as a Matter of Law, in Square Conflict with Decisions of this Court and of Other Circuits 1

A. The Court Should Grant Certiorari to Resolve the Significant and Continuing Split Among the Circuits, Left Unanswered by Abdur'Rahman v. Bell, 537 U.S. 88 (2002), Over the Jurisdiction of District Courts to Entertain Fed. R. Civ. P. 60(b) Motions in Habeas Corpus Cases 7

B. The Gonzalez Decision's Bright Line Prohibition of Rule 60(b)(6) Jurisdiction In Habeas Corpus Cases Is Wrong, As Are the Decisions of the Tenth Circuit, in Rejecting the Case-by-Case Jurisdiction Granted by Eight Other Circuit Courts of Appeals 9

(1) Applying 28 U.S.C. § 2244(b)(1)'s Successive Application Bar as a Bright Line Prohibition of Rule 60(b)(6) Jurisdiction Is Contrary to the Court's Precedents, Which Carefully Avoid Conflict with the Fifth Amendment's Due Process Clause and the Suspension of the Writ Clause of U.S. Const. art. I sec. 9 9

(2) The Eleventh Circuit's Bright Line Prohibition of Rule 60(b) Jurisdiction Erroneously Replaces the Rule 60(b) Standard for Relief With a Formulation Developed in the Inapposite Decision of Calderon v. Thompson 11

II. Whether a Court of Appeals Abuses its Discretion in Refusing to Permit Consideration of a Vital Intervening Legal Development When the Failure to Do So Precludes a Habeas Petitioner from Ever Receiving Any Adjudication on His Claims on the Merits 12

A. The Due Process Clause of the Fifth Amendment Prohibits Any Interpretation of Rule 60(b)(6) That Deprives a Habeas Petitioner of His Entitlement to a Timely Filed First Federal Habeas Corpus Proceeding. . . . 13

B. The Eleventh Circuit's Bright Line Rule Interpreting AEDPA as Repealing, Sub Silentio, Rule 60(b)(6) in Habeas Corpus Cases Violates The

Suspension of the Writ Clause of U.S. Const. art. I sec. 9 13

REPLY APPENDIX

Appellant's En Banc Letter Brief, dated July 10, 2003 . . . . . A-12

TABLE OF AUTHORITIES

CASES:

Abdur'Rahman v. Bell,
535 U.S. 1016 (2002) 7
537 U.S. 88 (2002) 7

Boone v. Sec'y, Dep't of Corrs.,
371 F.3d 1317 (11th Cir. 2004) (vacated),
377 F.3d 1315 (11th Cir. 2004) (on rehearing granted) 3-4

Boyd v. United States,
304 F.3d 813 (8th Cir. 2002) 7

Calderon v. Thompson,
523 U.S. 538 (1998) 10-12

Dunlap v. Litscher,
301 F.3d 873 (7th Cir. 2002)
cert. denied sub nom., Lanzotti v. United States, 537 U.S. 1140 (2003),
cert. denied sub nom., Hunt v. United States, 537 U.S. 1234 (2003),
cert. denied sub nom., Dunlap v. Frank, 123 S. Ct. 2644 (2003) 7

Gonzalez v. Sec'y for the Dep't of Corrs.,
366 F.3d 1253 (11th Cir. 2004) . . . . . passim

Hamilton v. Newland,
374 F.3d 833 (9th Cir. 2004) 7

Harris v. United States,
536 U.S. 545 (2002) 1,11

Harris v. United States,
367 F.3d 74 (2d Cir. 2004) 5

Hess v. Cockrell,
281 F.3d 212 (5th Cir.2002) 7

In re Abdur'Rahman,
No. 02-6547/6548 (6th Cir. Dec. 13, 2004) (en banc)
available at http://pacer.ca6.uscourts.gov/opinions.pdf/ 04a0428p-06.pdf . . . . passim

Jackson v. Champion,
166 F.3d 1221 (table),
1998 WL 792069 (10th Cir. 1998) 6

Lopez v. Douglas,
141 F.3d 974 (10th Cir. 1998) 5,6,8

Lucky v. Ward,
232 F.3d 901 (table),
2000 WL 1678399 (10th Cir. 2000) 5

McQueen v. Scroggy,
99 F.3d 1302 (6th Cir. 1996) 6

Plaut v. Spendthrift Farm, Inc.,
514 U.S. 211 (1995) 13-14

Pridgen v. Shannon,
380 F.3d 721 (3rd Cir. 2004),
pet. for cert. filed (U.S. Oct. 29, 2004) (No. 04-7060) 6

Reid v. Angelone,
369 F.3d 363 (4th Cir. 2004) 6

Rodriguez v. Mitchell,
252 F.3d 191 (2d Cir. 2001) 6,8

Rodwell v. Pepe,
324 F.3d 66 (1st Cir. 2003),
cert. denied, 124 S. Ct. 224 (2003) 6

Slack v. McDaniel,
529 U.S. 473 (2000) 14

Thompson v. Calderon,
151 F.3d 918 (9th Cir.1998) 7

United States v. Brown,
7 Fed. Appx. 825 (10th Cir. 2001) (unpublished) 5

United States v. Sternberg,
5 Fed. Appx. 806 (10th Cir. 2001) (unpublished) 5

United States v. Weinstock,
340 F.3d 200 (4th Cir. 2003),
cert. denied, 124 S. Ct. 496 (2003) 7

United States ex rel. Attorney General v. Delaware & Hudson Co.,
213 U.S. 366 (1909) 1,11

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES:

U.S. Const. Amend V 9-11,13

U.S. Const. Art. I, sec. 9 9-11,13

Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"),
Pub. L. No. 104-132, 110 Stat. 1214 2

SUP. CT. R. 10 9

Fed. R. Civ. P. 60(b) . . . . . passim

Fed. R. Civ. P. 60(b)(3) 2,3

Fed. R. Civ. P. 60(b)(6) . . . . . passim

REPLY TO BRIEF IN OPPOSITION

Respondent misstates the first question presented, misconstrues the holding of the court of appeals below, ignores the unanimous interpretation of that holding by that court and other circuits, and erroneously claims that petitioner's second question was never a subject of proceedings below (even though it was briefed and is at the core of the en banc court of appeals' holding). In reply, we dispel respondent's restatements, misstatements, and errors. But first, two fundamental points:

- Respondent acknowledges a circuit split on the issue that is the gravamen of the Petition. Resp. Br. at 17-18 (recognizing conflict and citing cases).

- Respondent's failure to substantively contest the Petition's Due Process and Suspension of the Writ contentions implicitly concedes those points, necessarily invoking the Court's doctrine of constitutional avoidance - "[W]hen a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." Harris v. United States, 536 U.S. 545, 555 (2002) (quoting United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U.S. 366, 408 (1909)).

I. The Court of Appeals Erred in Holding That Every Rule 60(b) Motion (Other than Fraud under (b)(3)) Constitutes a Prohibited "Second or Successive" Petition as a Matter of Law, in Square Conflict with Decisions of this Court and of Other Circuits.

Rather than respond to the issue as set forth in the Petition and fully acknowledge the evident circuit split, respondent seeks to minimize the split by distorting the Eleventh Circuit's holding below, restating (misstating) the issue presented here as if the Eleventh Circuit's decision

had been simply a case-by-case holding based on given circumstances,[1] and then concluding the decision is a mainstream determination. Respondent's description of the holding is contrary to the majority's black letter decision below, the view of all four dissenting judges, subsequent interpretation of the same court of appeals, and the view of other circuit judges who decided the issue after Gonzalez - all concluding that Gonzalez is a categorical jurisdictional bar to the use of Rule 60(b)(6) in habeas corpus cases, a decision that other circuits identify as being on the outer fringe of a three-way split among the circuits.

The black letter holding of Gonzalez is a categorical jurisdictional prohibition of Rule 60(b) motions in habeas corpus proceedings (except those alleging fraud under 60(b)(3)):

> In conclusion, a Rule 60(b) motion seeking to reopen the judgment in a § 2254 or § 2255 case should be denied by the district court, unless it is filed to correct a clerical mistake (meaning it is really a 60(a) motion) or is filed pursuant to Rule 60(b)(3) to remedy a fraud agents of the government perpetrated on the federal court.

Gonzalez, 366 F.3d at 1285-86. This categorical preclusion affirmed the district court's order that it was without jurisdiction to entertain Mr. Gonzalez's Rule 60(b)(6) motion. 366 F.3d at 1261; R1:34.

Judges Tjoflat, Barkett and Wilson joined in a dissent that described the majority's holding as a categorical jurisdictional bar:

> Today, the majority today [sic] holds that with the exception of the ground provided by Rule 60(b)(3) the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, precludes the district

---

[1] Respondent "restated" the issue as, "Whether the United States Court of Appeals for the Eleventh Circuit properly determined that under certain circumstances an attempt to reopen a federal habeas petition finally decided on the merits constitutes a successive petition and is subject to the requirements of 28 U.S.C. § 2244(b). Resp. Br. at i (emphasis added).

> courts of the Eleventh Circuit from entertaining Rule 60(b) motions filed by prisoners who seek the vacation of the district court's judgment denying them habeas relief.

366 F.3d at 1287, 1310 (footnote omitted). In a separate dissenting opinion, Chief Judge Edmondson characterized the holding as a "sharp-edged formulation ... of Rule 60," 366 F.3d at 1286, noting that the majority's categorical jurisdictional approach dispenses with case-by-case analysis: "It might be easier because this approach seems to require less deliberate study of the pertinent motion - study to determine accurately not just the name of the pertinent motion, but the function of the motion ...." Id. But Judge Edmondson rightly rejected the majority's categorical jurisdictional rule because "federal judges are not the rightful makers of policy in this sphere. And we cannot properly favor what is convenient over what is true." Id. These latter comments, in particular, belie respondent's position that the holding below is a routine case-by-case determination, based upon the circumstances presented in Mr. Gonzalez's motion.

Three months after Gonzalez was decided - indeed after the Petition was filed herein - a panel of the Eleventh Circuit Court of Appeals relied on Gonzalez in another habeas corpus case, Boone v. Sec'y, Dep't of Corrs., 371 F.3d 1317 (11th Cir. 2004) (vacated), to sua sponte affirm the dismissal of a Rule 60(b) motion based on the jurisdictional bar erected in the en banc Gonzalez decision:

> We cannot reach these questions because the district court never had jurisdiction to entertain the rule 60(b) motion. We are obligated to raise questions concerning our subject matter jurisdiction sua sponte in all cases. ... Pursuant to this Court's en banc decision in Gonzalez v. Sec'y for the Dep't of Corrs., the law surrounding Rule 60(b) motions has now been clarified. ... Sitting en banc, our Court ... held that district courts do not have the jurisdiction to consider Rule 60(b) motions to reconsider the denial of a habeas petition unless the motion is a 60(b)(3) motion, that is, one made to prevent fraud upon the court.

Boone v. Sec'y, Dep't of Corrs., 377 F.3d 1315 (11th Cir. 2004) (on rehearing granted).

Other circuits have likewise viewed Gonzalez as imposing a categorical jurisdictional bar, not a case-by-case, or circumstances-based, determination. Most recently, in the Sixth Circuit's en banc decision in In re Abdur'Rahman, No. 02-6547/6548, slip op. at 4 (6th Cir. Dec. 13, 2004) (en banc), available at http://pacer.ca6.uscourts.gov/opinions.pdf/ 04a0428p-06.pdf,[2] both the majority and dissenting judges characterized the Eleventh Circuit's Gonzalez decision as a categorical approach. In describing the three-way split among the circuits, the majority wrote:

> At the other end of the spectrum, several courts of appeals, as well as the dissent in our case, have concluded that a Rule 60(b) motion in a habeas case must always - or almost always - be treated as a second or successive petition pursuant to AEDPA. See, e.g., Gonzalez v. Sec'y for Dep't of Corrs., 366 F.3d 1253 (11th Cir. 2004) (en banc) (holding that Rule 60(b) motions must always be treated as a second or successive habeas petitions except where the final judgment is recalled or reopened to correct clerical errors in the judgment itself or where there has been fraud upon the federal court which led to the denial of the habeas petition) ....

Id. at 4. The Abdur'Rahman majority rejected the "categorical" and "rigid approach, adopted by the Eleventh Circuit ...." Id. (Cole, J., Martin, Daughtrey, Moore, Clay, Gilman and Gibbons, JJ., joining). The Abdur'Rahman dissent, on the other hand, embraced the Eleventh Circuit's bright-line jurisdictional bar:

> Of particular relevance is the Eleventh Circuit's recent decision in Gonzalez ... (recognizing two narrow exceptions - for clerical errors and fraud - to the rule that a Rule 60(b) motion is "second or successive" and noting that "[a]n error of law, even one demonstrated by an intervening decision, does not fit either ... exception[]").

---

[2] As of December 29, 2004, the Westlaw version of the decision incorrectly identifies the split of the en banc court as 12-1, with only Judge Siler dissenting. 2004 WL 2847749 at *11. The en banc court split 7-6, as indicated in the original slip decision, available at http://pacer.ca6.uscourts.gov/opinions.pdf/04a0428p-06.pdf.

Id. at 11, 14-15 (Siler, J., dissenting, Boggs, C.J., Batchelder, Rogers, Sutton, and Cook, JJ., joining). Although they disagreed about what the Sixth Circuit rule should be, every Sixth Circuit judge agreed that the Eleventh Circuit's Gonzalez decision sets forth a categorical rule that prohibits 60(b)(6) motions in habeas corpus cases. The Sixth Circuit's understanding of the Gonzalez holding is also consistent with other circuits' view of earlier Eleventh Circuit precedent. Harris v. United States, 367 F.3d 74, 79 & n.3 (2d Cir. 2004) (including the Eleventh Circuit among the three circuits that hold that, "regardless of the substance of its allegations, such a motion is always 'a second or successive' habeas petition under AEDPA"); Pridgen v. Shannon, 380 F.3d 721, 725 (3rd Cir. 2004) (same), pet. for cert. filed (U.S. Oct. 29, 2004) (No. 04-7060).

Not only does respondent misconstrue the Gonzalez holding below, but he attempts to do the same to the categorical jurisdictional approach taken by the Tenth Circuit and formerly taken by the Sixth Circuit. Attempting to minimize the circuit conflict, respondent argues that it is an "overstatement to characterize" the Tenth Circuit's decision in Lopez v. Douglas, 141 F.3d 974 (10th Cir. 1998), as holding that a Rule 60(b) motion is always a successive petition, Resp. Br. at 11, but this runs counter to the Tenth Circuit's own interpretation of Lopez. See United States v. Brown, 7 Fed. Appx. 825, 828 (10th Cir. 2001) (unpublished) ("This court has stated that, in keeping with the requirements of AEDPA, a motion pursuant to Federal Rule of Criminal Procedure 60(b) which follows the dismissal of a 28 U.S.C. § 2254 petition must be treated as a successive habeas petition" (citing Lopez) and "a district court lacks jurisdiction to hear a petitioner's successive habeas petition"); United States v. Sternberg, 5 Fed. Appx. 806, 808 (10th Cir. 2001) (unpublished) (same); Lucky v. Ward, 232 F.3d 901 (table), 2000 WL 1678399 (10th

Cir. 2000) (same, as to Rule 60(b)(6)); Jackson v. Champion, 166 F.3d 1221 (table), 1998 WL 792069 (10th Cir. 1998) (same). Respondent also contends that the Sixth Circuit's original precedent in McQueen v. Scroggy, 99 F.3d 1302 (6th Cir. 1996), was not a categorical bar of 60(b) motions, Resp. Br. at 10-11, yet the Sixth Circuit itself considered McQueen a categorical bar, slip op. at 4, 6, an approach it rejected when it expressly overruled McQueen, en banc. Id. at 6.[3]

When the Gonzalez and Lopez holdings are correctly described, the three-way split among the circuits is evident and irrebuttable. One circuit holds that Rule 60(b)(6) motions are never successive. Rodriguez v. Mitchell, 252 F.3d 191, 198 (2d. Cir. 2001). Two circuits take a categorical approach holding that they are always successive and must be dismissed. Gonzalez v. Sec'y for Dep't of Corrs., 366 F.3d 1253 (11th Cir. 2004) (en banc); Lopez v. Douglas, 141 F.3d 974, 975 (10th Cir. 1998). The remaining eight circuits take a middle ground – a functional approach – examining the substance of each individual Rule 60(b) motion to determine if it is properly filed or merely a successive petition in disguise.[4]

---

[3] Until recently, the Sixth Circuit was also aligned with the categorical approach of the Tenth and Eleventh Circuits. But two weeks ago, the en banc Sixth Circuit overruled its precedent, McQueen v. Scroggy, 99 F.3d 1302 (6th Cir. 1996), "eschew[ing] both extremes and align[ing] ourselves with those courts that use a functional approach to determine when a district court may entertain a Rule 60(b) motion filed by a prisoner who seeks to vacate a district court's judgment denying him habeas relief." In re Abdur'Rahman, No. 02-6547/6548, slip op. at 2, 4-6 (6th Cir. Dec. 13, 2004) (en banc).

[4] Rodwell v. Pepe, 324 F.3d 66, 70-71 (1st Cir.), cert. denied 124 S. Ct. 224 (2003) (holding that Rule 60(b) motion is available when it "deals primarily with some irregularity or procedural defect" of the habeas proceeding itself); Pridgen v. Shannon, 380 F.3d 721, 725 (3rd Cir. 2004) (holding that where factual predicate of Rule 60(b) motion attacks manner in which earlier habeas judgment was procured, it is not successive and is cognizable), pet. for cert. filed (U.S. Oct. 29, 2004) (No. 04-7060); Reid v. Angelone, 369 F.3d 363, 375 (4th Cir. 2004)

A. The Court Should Grant Certiorari to Resolve the Significant and Continuing Split Among the Circuits, Left Unanswered by Abdur'Rahman v. Bell, 537 U.S. 88 (2002), Over the Jurisdiction of District Courts to Entertain Fed. R. Civ. P. 60(b) Motions in Habeas Corpus Cases.

Acknowledging a circuit split, respondent nevertheless attempts to minimize it, Resp. Br. at 17-18, even though the divide between the circuits is greater today than when the Court granted certiorari in Abdur'Rahman v. Bell, 535 U.S. 1016 (2002), and when it later dismissed it due to procedural difficulties unique to that case. See Abdur'Rahman v. Bell, 537 U.S. 88 (2002) (STEVENS, J., dissenting). This is true even though the Sixth Circuit has since abandoned its extreme categorical approach to join the functional approach followed in most circuits.

When the Petition was filed herein, the three-way split among the circuits counted the Sixth

---

(vacating order denying mixed Rule 60(b) motion including both successive and true issues, permitting petitioner to elect to proceed only on 04-7060) true 60(b)(6) issue); United States v. Weinstock, 340 F.3d 200, 206-07 (4th Cir.), cert. denied, 124 S. Ct. 496 (2003) (holding that not all Rule 60(b) motions are successive applications; each case should be analyzed based on the nature of the claims presented); Hess v. Cockrell, 281 F.3d 212, 215 (5th Cir.2002) (taking a dim view of using a Rule 60(b) motion to set aside the denial of habeas, but expressly declining to decide whether such Rule 60(b) motions are always successive habeas petitions); In re Abdur' Rahman, No. 02-6547/ 6548, slip op. at 4-6 (6th Cir. Dec. 13, 2004) (en banc) (expressly rejecting categorical approach of Gonzalez in favor of functional case-by-case analysis); Dunlap v. Litscher, 301 F.3d 873, 876 (7th Cir. 2002) (allowing Rule 60(b) motion to reopen previous habeas case as long as the substance of the motion does not pertain to "territory occupied by AEDPA"), cert. denied sub nom., Lanzotti v. United States, 537 U.S. 1140 (2003), cert. denied sub nom., Hunt v. United States, 537 U.S. 1234 (2003), cert. denied sub nom., Dunlap v. Frank, 123 S. Ct. 2644 (2003); Boyd v. United States, 304 F.3d 813, 814 (8th Cir. 2002) (per curiam) (directing district courts to conduct "a brief initial inquiry to determine whether the allegations in the Rule 60(b) motion in fact amount to a second or successive collateral attack" in which case the motion should be denied as barred or transferred to the court of appeals for certification); Hamilton v. Newland, 374 F.3d 822 (9th Cir. 2004) (holding district court should have treated habeas petitioner's motion solely as a 60(b)(6) motion and not as a second or successive petition under AEDPA); Thompson v. Calderon, 151 F.3d 918, 921 & n.3 (9th Cir.1998) (en banc) (holding that a Rule 60(b) motion ordinarily "should be treated as a successive habeas petition," but declining to adopt "a bright line rule equating all Rule 60(b) motions with successive habeas petitions").

with the Tenth and Eleventh circuits, a position since repudiated in In re Abdur'Rahman, No. 02-6547/6548, slip op. at 4-6 (6th Cir. Dec. 13, 2004) (en banc). Despite its decision, the Sixth Circuit majority recounted the continuing three-way split among the circuits and the continuing criticism that the majority of circuits level at the holdings of the three fringe circuits:

> The courts of appeals that have heretofore grappled with this question have provided divergent answers. The Second Circuit seems to be the only court of appeals to have ruled categorically that a motion pursuant to Rule 60(b), brought after a district court's ruling on an initial habeas petition, is not a second or successive habeas petition, and that such motions should always be treated as any other motion pursuant to Rule 60(b). Rodriguez v. Mitchell, 252 F.3d 191, 198 (2d Cir. 2001).
>
> At the other end of the spectrum, several courts of appeals, as well as the dissent in our case, have concluded that a Rule 60(b) motion in a habeas case must always – or almost always – be treated as a second or successive habeas petition pursuant to AEDPA. See, e.g., Gonzalez v. Sec'y for Dep't of Corrs., 366 F.3d 1253 (11th Cir. 2004) (en banc) (holding that Rule 60(b) motions must always be treated as second or successive habeas petitions except where the final judgment is recalled or reopened to correct clerical errors in the judgment itself or where there was fraud upon the federal court which led to the denial of the habeas petition); Lopez v. Douglas, 141 F.3d 974, 975 (10th Cir.1998) (holding that the successive petition restrictions contained in 28 U.S.C. § 2244(b) apply to Rule 60(b) motions). ... According to the Eleventh Circuit, which is the leading proponent of this view, permitting Rule 60(b) to operate as it customarily does would allow prisoners to circumvent AEDPA's restrictions on second and successive habeas petitions in federal courts. Gonzalez, 366 F.3d at 1256 ("One of the most popular vehicles used in the attempted end-runs [around AEDPA] is a Fed.R.Civ.P. 60(b) motion requesting that the prior judgment denying relief be set aside.").
>
> But neither of the categorical approaches just described is satisfactory. The wholly unrestricted approach taken by the Rodriguez court fails to appreciate the potential for some Rule 60(b) motions to subvert AEDPA's objectives. But the rigid approach, adopted by the Eleventh Circuit and the dissent here, prohibits too much. It fails to appreciate both the significant functional differences between Rule 60(b) motions and habeas petitions and that those differences mean that many Rule 60(b) motions will not run afoul of AEDPA.

In re Abdur'Rahman, No. 02-6547/6548, slip op. at 4

There is no reason to believe, as respondent contends, that the circuits on the far side of the divide will "refine" and "clarif[y]" their approaches to Rule 60(b) in a way that unites them or joins the divide. Resp. Br. at 25. To the contrary, recent decisions of the Tenth and Eleventh circuits (including the en banc decision below) demonstrate that these two outliers are set in their categorical jurisdictional approach. At the other extreme, so is the Second Circuit. Other circuits are equally certain that both extremes are wrong. Unless the Court addresses this division, prisoners in some circuits are jurisdictionally denied access to the Rule 60(b) door to the district courthouse, absent fraud, while prisoners in all other circuits may have their proper motions decided on the merits. This kind of disparity compels Supreme Court review at this time. See SUP. CT. R. 10.

B. The Gonzalez Decision's Bright Line Prohibition of Rule 60(b)(6) Jurisdiction In Habeas Corpus Cases Is Wrong, As Are the Decisions of the Tenth Circuit, in Rejecting the Case-by-Case Jurisdiction Granted by Eight Other Circuit Courts of Appeals.

Respondent argues extensively that the decision below is substantively correct. Nine courts of appeals and the Petition disagree. The Petition stage is not the time to argue the merits further. Coincidentally, however, respondents argument reinforces the cert-worthiness of the Petition. If respondent is correct that the decision below is correct, then nine other circuits are not following the law and are permitting litigation outlawed by AEDPA. Certiorari is just as appropriate under those circumstances.

(1) Applying 28 U.S.C. § 2244(b)(1)'s Successive Application Bar as a Bright Line Prohibition of Rule 60(b)(6) Jurisdiction Is Contrary to the Court's Precedents, Which Carefully Avoid Conflict with the Fifth Amendment's Due Process Clause and the Suspension of the Writ Clause of U.S. Const. art. I sec. 9.

Respondent misrepresents to the Court that the Petition's argument concerning the "procedural due process right to a first federal habeas petition ... was not before the Eleventh Circuit," Resp. Br. at 7 n.9, and that petitioner "did not present the [Suspension of the Writ] argument now made before this Court." Id.[5] Respondent's misrepresentation cannot stand unchallenged. Both issues were before the en banc court of appeals in the form they are presented here. Petitioner presented detailed written argument on both the procedural Due Process and Suspension of the Writ issues, four pages devoted to the Due Process implications of the Eleventh Circuit's proposed holding, Appellant's Letter Br., dated July 10, 2004, at 4-8; three more pages devoted to a discrete Suspension of the Writ claim, id. at 8-10; and a page of summary of both issues. Id. at 3, 13, 15. [6] Indeed, whole segments of the Petition's argument and citations of

[5] Respondent cites, out of context, a footnote in petitioner's initial en banc brief, that distinguishes the procedural Due Process claim from a Suspension of the Writ claim, but fails to advise the Court that later in the briefing petitioner detailed a separate Suspension of the Writ argument. See infra at 10 n.6.

[6] En banc briefing before the court of appeals came in two stages. Initially, the court asked the parties to brief the answers to four questions. Later, on June 10, 2003, the court asked the parties to file a letter brief answering two supplemental questions, which would signal the eventual decision: "(1) Should the general principles of habeas cases and AEDPA 'inform' the decision whether Rule 60(b) relief is available post-AEDPA?; and (2) Except in cases of fraud on the federal habeas court, is Rule 60(b) relief available only 'to avoid miscarriage of justice as defined by our habeas corpus jurisprudence?'" Court of Appeals' Letter, dated June 27, 2003. Petitioner timely filed his Letter Brief on July 10, 2003, Appendix A-12 (attached), commencing his response to the supplemental questions with the preface. "As explained more fully below, the answers to both questions are constrained by at least two constitutional limitations, as well as the substantial differences between Calderon v. Thompson, 523 U.S. 538 (1998), and the present case." Appellant's Letter Br. at 1. This was followed by a summary of the argument:

> We advance, in turn, three responses to this Court's first question: (a) The Due Process Clause of the Fifth Amendment prohibits any interpretation of Rule 60(b)(6) that deprives Mr. Gonzalez of his entitlement to a timely filed first federal habeas corpus proceeding; (b) Applying 28 U.S.C. § 2244(b)(1) to inform the

authority are verbatim the arguments and citations of authority made below. Compare Petition 17-22, 27-34 with Appellant's Letter Br. at 3-10, 13, 15.

To the extent respondent failed to respond to the substance of these constitutional barriers to the Eleventh Circuit's interpretation of AEDPA, respondent implicitly concedes the necessity of invoking the Court's doctrine of constitutional avoidance, "[W]hen a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." Harris v. United States, 536 U.S. 545, 555 (2002) (quoting United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U.S. 366, 408 (1909)).

(2) The Eleventh Circuit's Bright Line Prohibition of Rule 60(b) Jurisdiction Erroneously Replaces the Rule 60(b) Standard for Relief With a Formulation Developed in the Inapposite Decision of Calderon v. Thompson

Respondent defends the substance of the Eleventh Circuit's decision and its strained

---

interpretation of Rule 60(b)(6) in a way that prohibits Rule 60(b)(6) motions as successive habeas petitions, is unconstitutional under the Suspension of the Writ Clause of U.S. Const. art. I sec. 9; and (c) Calderon v. Thompson is inapposite to Mr. Gonzalez's case, both in substance and procedure, making it an inappropriate candidate from which to borrow jurisprudence with which to decide the present case.

Appellant's Letter Br. at 3. This in turn, was followed by argument on each of the three points, with citations of authority. The Due Process claim was set forth at pages 4-8 of the Letter Brief. A discrete Suspension of the Writ argument was made at pages 8-10. The same two arguments were incorporated by reference in answer to the second question, as well, id. at 13, and were summarized in the concluding paragraph. Id. at 15. It is difficult to think respondent merely overlooked all of this briefing since he responded in writing to both the Due Process and Suspension of the Writ arguments in Appellee's Letter Br., filed July 22, 2003, at 7-11. In short, it is just plain wrong to suggest, as respondent has, that the issues were not presented to, and were not before, the court below.

application of the Court's decision in Calderon v. Thompson, 523 U.S. 538 (1998). Yet Respondent misses the salient point at this stage of certiorari proceedings: No other circuit has adopted a similar formulation or interpretation of Calderon, even though nine other circuits have held, post-Calderon, that Rule 60(b) motions are jurisdictionally permitted in habeas corpus cases. See supra at 6-7 n.4.

II. A Court of Appeals Abuses its Discretion in Refusing to Permit Consideration of a Vital Intervening Legal Development When the Failure to Do So Precludes a Habeas Petitioner from Ever Receiving Any Adjudication on His Claims on the Merits.

Respondent contends that the Petition's second question was not before the court of appeals below, so it should not be considered here. Resp. Br. at 7 n.9. From the title, to the subtitles, to the argument and citations of authority, the Petition's second question was certainly before the court below.

The second question presented involves the abuse of discretion flowing from refusal to allow reopening of a habeas proceeding to consider intervening legal authority in a case improperly dismissed without an adjudication of the prisoner's claims. Both parties identified "abuse of discretion" as the standard of review in the court of appeals and petitioner argued abuse of discretion in his written briefing and oral argument below. Appellant's Initial En Banc Br. at 6, 50-54; Appellee's En Banc Br. at 7; Appellant's En Banc Reply Br. at 21-27. Indeed, the title of issue 4 of petitioner's initial brief was: "It was an abuse of discretion for the district court to deny the Rule 60(b) motion in this case." Appellant's Initial En Banc Br. at iii. This was followed by argument and citations of authority, concluding that it is an abuse of discretion when the decision to deny a Rule 60(b) motion rests on an errant conclusion of law. Id. at 50-53. And, as indicated supra at 10-11 n.6, the argument was extended in supplemental briefing ordered by the

court of appeals. The court of appeals acknowledged that it asked the parties to brief and argue the abuse-of-discretion issue. Gonzalez, 366 F.3d at 1256. The majority decision of the court of appeals pretermits the answer, ruling instead that a jurisdictional bar prevents a Rule 60(b)(6) motion from being heard at all, id. at 1281-82, 1285-86, but the issue was certainly before the court.[7]

A. The Due Process Clause of the Fifth Amendment Prohibits Any Interpretation of Rule 60(b)(6) That Deprives a Habeas Petitioner of His Entitlement to a Timely Filed First Federal Habeas Corpus Proceeding.

B. The Eleventh Circuit's Bright Line Rule Interpreting AEDPA as Repealing, Sub Silentio, Rule 60(b)(6) in Habeas Corpus Cases Violates The Suspension of the Writ Clause of U.S. Const. art. I sec. 9

As observed earlier, respondent misrepresents to the Court that the Petition's argument concerning the "procedural due process right to a first federal habeas petition ... was not before the Eleventh Circuit," Resp. Br. at 7 n.9, and that petitioner "did not present the [Suspension of the Writ] argument now made before this Court." Id. Respondent's claim is simply not true, as is explained in detail supra at 10-11 n.6. To the extent respondent ignored these two constitutional barriers to the Eleventh Circuit's decision, respondent necessarily concedes them, completely undermining the correctness of the decision below.

Attempting to cabin the Rule 60(b) question within procedural default law, respondent claims that the "dismissal" of petitioner's original habeas corpus claim, R1:17, was a merits determination. Resp. Br. at 13-16. In support, respondent relies on a series of inapposite lower

[7] Conforming the title of the question presented in this Court to identify the last court to rule erroneously – the court of appeals – is certainly appropriate after the court of appeals repeats the error of the district court, and as the litigation moves from that level to this Court.

court decisions and Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995). Resp. Br. at 13-14. Plaut holds, in the very different setting of a civil securities fraud case, that an adverse determination resulting from a statute of limitations defense is deemed on the merits such that Congress cannot retroactively compel a court to reopen the case, nor authorize a plaintiff to file a new lawsuit in place of the previously closed litigation. But Plaut's holding does not follow to the context of a habeas corpus case, where the Court has looked to whether a decision was made on the actual claims of the habeas petition to decide if it was dismissed procedurally or on the merits. See, e.g., Slack v. McDaniel, 529 U.S. 473, 488 (2000) (holding that original dismissal was procedural, not on the merits – and therefore new petition was not second or successive – because "'[n]o claim made in Slack's 1991 petition was adjudicated during the three months it was pending in federal court").

In addition, neither Plaut, nor any of the other cited decisions, involves Rule 60(b) or its use in habeas corpus proceedings. It follows, obviously, that they do not prevent the use of Rule 60(b) to reopen a closed habeas corpus case, whether closed on the merits or on procedural grounds. Analysis of Rule 60(b) differs from the analysis in Plaut because in Plaut Congress attempted to direct the courts to reopen closed litigation based on a new law; Rule 60(b), however, was in effect when petitioner's case was first decided and it has traditionally permitted a court to exercise discretion to reopen a closed case for a variety of reasons, including, under 60(b)(6), an intervening decision that undermines how the law originally in effect was interpreted. Gonzalez, 366 F.3d at1289-92 (Tjoflat, J. dissenting, Barkett and Wilson, JJ., joining).

Finally, respondent's Opposition cautions that if certiorari is granted and petitioner prevails, Rule 60(b)(6) may be used as a tool to reopen other closed cases based on other

intervening changes in law. Resp. Br. at 21-22. Two replies: First, Rule 60(b) is already available for this purpose in most circuits. Second, it should be available in all circuits, precisely for such purposes.

Respectfully submitted,

KATHLEEN M. WILLIAMS
Federal Public Defender

By: _____
Paul M. Rashkind, Supervisory
Assistant Federal Public Defender
Counsel of Record for Petitioner

Miami, Florida
December 29, 2004

P:\Gonzalez, Aurelio O Reg\Appeal\Cert Petition\Gonzalez Cert Reply Final.wpd

REPLY APPENDIX

REPLY APPENDIX

Appellant's En Banc Letter Brief, dated July 10, 2003 . . . . . A-12

DERAL PUBLIC DEFENDER
Southern District of Florida

Kathleen M. Williams
Federal Public Defender

Reuben Camper Cahn
Chief Assistant Federal Public Defender

Location: Miami

Miami:
Stewart G. Abrams
William R. Barzee
Helaine B. Batoff
Henry P. Bell
Beatriz Galbe Bronis
Miguel Caridad
Michael Caruso
Timothy Cone
Chantel R. Doakes
Orlando do Campo
Hector A. Dopico
Daniel L. Ecarius
Vincent P. Farina
Hector L. Flores
Margaret Y. Foldes
Peter J. Fucci
Krista A. Halla
Celeste Sibley Higgins
Richard C. Klugh, Jr.
Paul M. Korchin
Richard J. Lautenbach
Anne Lyons
T. Omar Malone
Joaquin Mendez
Faith Mesnekoff
Paul M. Rashkind
Marc D. Seitles
Jacqueline E. Shapiro
Michael D. Spivack
William L. Thomas
John W. Wylie

Ft. Lauderdale:
Janice Bergmann
Robert N. Berube
Brenda G. Bryn
Timothy M. Day
Robin J. Farnsworth
Patrick M. Hunt
Bernardo Lopez
Neison M. Marks
Samuel J. Smargon
Daryl E. Wilcox

West Palm Beach:
Robert E. Adler
Lori E. Barrist
Martin J. Bidwill
Peter Birch
Dave Lee Brannon
Robin C. Rosen-Evans

Ft. Pierce:
Leon Daniel Watts

July 10, 2003

Thomas K. Kahn, Clerk
United States Court of Appeals for the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, GA. 30303

Re: Case No. 02-12054
Aurelio Gonzalez v. Secretary for the Department of Corrections

Dear Sir:

By letter of June 27, 2003, the Court has posed two supplemental questions: (1) Should the general principles of habeas cases and AEDPA "inform" the decision whether Rule 60(b) relief is available post-AEDPA?; and (2) Except in cases of fraud on the federal habeas court, is Rule 60(b) relief available only "to avoid miscarriage of justice as defined by our habeas corpus jurisprudence?" Implicit in the questions is the concession that AEDPA does not expressly govern Rule 60(b) decisions, a concession with which we agree.

As explained more fully below, the answers to both questions are constrained by at least two constitutional limitations, as well as the substantial

Miami
150 West Flagler Street
Suite 1500
Miami, FL 33130-1555
Tel: (305) 536-6900
Fax: (305) 530-7120

Ft. Lauderdale
One East Broward Boulevard
Suite 1100
Ft. Lauderdale, FL 33301
Tel: (954) 356-7436
Fax: (954) 356-7556

West Palm Beach
400 Australian Avenue North
Suite 300
West Palm Beach, FL 33401-5040
Tel: (561) 833-6288
Fax: (561) 833-0368

Ft. Pierce
200 South Indian River Drive
Suite 207
Ft. Pierce, FL 34950
Tel: (772) 461-9435
Fax: (772) 461-9474

differences between Calderon v. Thompson, 523 U.S. 538 (1998), and the present case. In addition, the approaches suggested by both questions are inconsistent with the more favorable analytical framework used by the Supreme Court in post-judgment review of habeas corpus cases denied or dismissed on procedural grounds.

(1) To what extent, if any, and how, should the general principles underlying habeas and section 2255 cases guide, and the provisions of AEDPA inform, the decision of whether the grant of Rule 60(b) relief relating to a habeas or section 2255 judgment is available, and if available, is an abuse of discretion?

Rule 60(b) has six grounds for relief, fortified with an extensive body of jurisprudence of its own. See APPELLANT'S INITIAL EN BANC BRIEF, at 32, citing Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d §§ 2851-2873; 28 U.S.C.A. Fed. R. Civ. P. 57-60. The rule derives from the common-law and inherent powers of a court, but was codified in a rule-making process involving the Supreme Court and Congress. According to the rule and the many cases interpreting it, Rule 60(b) relief is granted in the discretion of the district court, based upon one of the six enumerated grounds and exceptional circumstances.

The authority of an appellate court to recall its mandate, on the other hand, is debatable, 523 U.S. at 549, and is not codified by statute or rule. To the extent it is recognized at all, it is a remedy "of last resort, held in reserve against grave, unforseen contingencies." Id. Due to a paucity of rules or jurisprudence of its own,

the authority to recall an appellate mandate must necessarily be informed by other rules and law. Id.

There is no reason, however, for Rule 60(b) determinations to be informed by anything more than its own well-developed jurisprudence, since it has broad explication in caselaw, both before its codification, and after. This is especially so to the extent that the alternative sources of jurisprudence proposed to "inform" the 60(b) decision conflict with the 60(b) body of law, and invite significant constitutional violations under the Due Process Clause of the Fifth Amendment and the Suspension of the Writ Clause of U.S. Const. art. I sec. 9. The potential constitutional violations prohibit such an application of AEDPA or informing a Rule 60(b) decision based on AEDPA.

We advance, in turn, three responses to this Court's first question: (a) The Due Process Clause of the Fifth Amendment prohibits any interpretation of Rule 60(b)(6) that deprives Mr. Gonzalez of his entitlement to a timely filed first federal habeas corpus proceeding; (b) Applying 28 U.S.C. § 2244(b)(1) to inform the interpretation of Rule 60(b)(6) in a way that prohibits Rule 60(b)(6) motions as successive habeas petitions, is unconstitutional under the Suspension of the Writ Clause of U.S. Const. art. I sec. 9; and (c) Calderon v. Thompson is inapposite to Mr. Gonzalez's case, both in substance and procedure, making it an inappropriate

candidate from which to borrow jurisprudence with which to decide the present case.

(a) The Due Process Clause of the Fifth Amendment prohibits any interpretation of Rule 60(b)(6) that deprives Mr. Gonzalez of his entitlement to a timely filed first federal habeas corpus proceeding.

Mr. Gonzalez has a statutory right to a single federal habeas corpus review of his state imprisonment. 28 U.S.C. § 2254. Denial of that right violates procedural due process. See INITIAL EN BANC BRIEF OF APPELLANT, at 27-31. Mr. Gonzalez filed a timely federal habeas corpus petition, raising claims of facial merit, which, under the law of this Circuit, constitute grounds for granting of the Writ. See INITIAL EN BANC BRIEF OF APPELLANT, at 21-23. His timely habeas corpus petition was aborted by AEDPA's limitations period (as misconstrued by the district court). He was deprived of any appeal of that error due to AEDPA's gatekeeping certificate of appealability requirement (decided pre-Slack v. McDaniel, 529 U.S. 473 (2000), when this Court still required a constitutional issue for issuance of a COA, even for procedural dismissals).

The combination of AEDPA legislation and erroneous court rulings deprived Mr. Gonzalez of habeas review to which he was entitled and appellate review to correct that error, ultimately effecting an arbitrary and complete denial of the statutory right of habeas corpus review, denying the most basic precepts of procedural due process. Now that the Supreme Court and this Court have corrected

the legal interpretation of the previously misconstrued AEDPA limitations period, in Artuz v. Bennett, 531 U.S. 4 (2000), and Delancy v. Florida Department of Corrections, 246 F.3d 1328 (11th Cir. 2001), Rule 60(b)(6) is the only available procedural device to prevent injustice and remedy the due process violation. To permit another provision of AEDPA - or the spirit of AEDPA - to inform the interpretation of Rule 60(b) to effectively repeal sub silentio Rule 60(b)'s use in this case is but a further violation of procedural due process.

Allowing AEDPA to have such deleterious effect is inconsistent with the approach taken by the Supreme Court in other cases where AEDPA threatened constitutional conflict. Good illustrations of this are Slack v. McDaniel, 529 U.S. 473, and Felker v. Turpin, 518 U.S. 651 (1996). In Slack, for example, the Supreme Court refused to allow the specific language of AEDPA - "§ 2253(c)'s requirement that a COA may issue only upon the 'substantial showing of the denial of a constitutional right'" - to prevent appeal of dismissals based on purely procedural grounds. The state in Slack had pointed to the apparently-plain language of AEDPA, but the Court rejected that approach, balancing AEDPA's harsh result against the importance of correctly decided habeas corpus proceedings:

> According to the State, only constitutional rulings may be appealed. Under this view, a state prisoner who can demonstrate he was convicted in violation of the Constitution and who can demonstrate that the district court was wrong to dismiss the petition on procedural

> grounds would be denied relief. We reject this interpretation. The writ of habeas corpus plays a vital role in protecting constitutional rights. In setting forth the preconditions for issuance of a COA under § 2253(c), Congress expressed no intention to allow trial court procedural error to bar vindication of substantial constitutional rights on appeal.
>
> Our conclusion follows from AEDPA's present provisions, which incorporate earlier habeas corpus principles.

529 U.S. at 483. Faced with a constitutional collision between AEDPA and the procedural due process right of habeas review, the Court chose to avoid the collision by interpreting the statute's limitations to fit within what the Constitution permits, allowing a COA for procedural dismissals, without the need to demonstrate an appellate issue of constitutional dimension. Where the apparent language of AEDPA leads to an unconstitutional result, the Court looked instead to the earlier habeas corpus jurisprudence incorporated in the statute.

This same approach drove the Court's decision in Felker v. Turpin. Rather than interpret AEDPA's apparently-plain language prohibiting Supreme Court jurisdiction to violate the Exceptions Clause of Art. III, § 2, or the Suspension Clause of Art. I, § 9 of the Constitution, the Court read the law to "not preclude this Court from entertaining an application for habeas corpus relief ... thereby obviat[ing] any claim by petitioner under the Exceptions Clause ... and ... the Suspension Clause... ." 518 U.S. 654. Its decision relied in large part upon Congressional silence about the fate of prior habeas corpus jurisprudence, despite

an express statutory directive:

> [W]e conclude that Title I of the Act has not repealed our authority to entertain original habeas petitions, for reasons similar to those stated in [Ex parte] Yerger, 8 Wall. 85, 19 L.Ed. 332 (1869). No provision of Title I mentions our authority to entertain original habeas petitions; in contrast, § 103 amends the Federal Rules of Appellate Procedure to bar consideration of original habeas petitions in the courts of appeals. Although § 2244(b)(3)(E) precludes us from reviewing, by appeal or petition for certiorari, a judgment on an application for leave to file a second habeas petition in district court, it makes no mention of our authority to hear habeas petitions filed as original matters in this Court. As we declined to find a repeal of § 14 of the Judiciary Act of 1789 as applied to this Court by implication then, we decline to find a similar repeal of § 2241 of Title 28–its descendant–by implication now.

518 U.S. 660-61 (footnotes omitted). As in Slack, Felker avoided constitutional collision by refusing to imply prohibitions in AEPDA that the Constitution does not tolerate. Interpreting AEDPA to fit within the Constitution, rather than interpreting it at face value, is the accepted approach. And it is equally appropriate here, constraining the extent to which AEDPA may influence or inform this Court's en banc determination.[1]

Much as the Supreme Court used Congressional silence as a reason for assuming AEDPA did not repeal prior habeas corpus jurisprudence, this Court must

---

[1] See generally Note, The Avoidance of Constitutional Questions and the Preservation of Judicial Review: Federal Court Treatment of the New Habeas Provisions, 111 Harv. L. Rev. 1578 (April 1998) (summarizing the courts' consistently liberal interpretation of the AEDPA to avoid constitutional difficulties).

do the same, not permitting Rule 60(b) jurisprudence in habeas corpus cases to be altered by Congressional silence on the 60(b) procedure.

(b) Applying 28 U.S.C. § 2244(b)(1) to inform the interpretation of Rule 60(b)(6) in a way that prohibits Rule 60(b)(6) motions as successive habeas petitions is unconstitutional under the Suspension of the Writ Clause of U.S. Const. art. I sec. 9.

"Prior to the enactment of [AEDPA], a state prisoner could file a same-claim second or successive federal habeas corpus petition (i.e., one raising a claim presented and denied in a prior habeas corpus petition)" where the "'ends of justice' would be served by addressing a claim on the merits," because a "'manifest miscarriage of justice would result if petitioner was not permitted to relitigate a claim." Randy Hertz & James S. Liebman, Federal Habeas Corpus Practice and Procedure § 28.4, at 1324-25 (4th ed. 2001). "AEDPA drastically revised prior law" by imposing a "blanket ban on successive litigation, codified in 28 U.S.C. § 2244(b)(1): 'A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.'" Id. Although, the Supreme Court upheld AEDPA's restrictions on new-claim successive petitions (§ 2244(b)**(2)**), "the constitutionality of AEDPA's blanket ban on same-claim petitions [(§ 2244(b)**(1)**)] is less certain." Id. (emphasis added). The reasons given by the Court for upholding § 2244(b)**(2)** simply do not apply to the blanket ban of § 2244(b)**(1)**.

Felker v. Turpin upheld the new-claim successive petition restrictions imposed by 28 U.S.C. § 2244(b)**(2)**, which limited new-claim successive petitions to those involving enumerated exceptional circumstances. Hertz & Liebman, Federal Habeas Corpus Practice and Procedure § 28.4(a), at 1326. Although AEDPA "'further restricted the availability of' such petitions, the Court ruled, it did so via provisions that were 'well within the compass' of 'the complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions.'" Hertz & Liebman, supra § 28.4(a), at 1326, quoting Felker, 518 U.S. 664.

Subsection (2) must be contrasted with the blanket prohibition of same-claim successive petitions - an absolute res judicata bar - imposed by § 2244(b)(1). "Because (1) section 2244(b)(1) does not simply 'further[] restrict' new-claim successive petitions, but, instead, forbids them under all circumstances, (2) because doing so works a literal suspension of the writ for such cases, and (3) doing so moves qualitatively beyond 'the compass' of preexisiting 'equitable principles ...[,] historical usage, statutory developments, and judicial decisions,' the same-claim provision poses a serious constitutional issue that Felker did not resolve." Id. The Hertz & Liebman treatise's caution is enhanced by the Supreme Court's reluctance to apply strict rules of res judicata in habeas corpus cases:

> [T]he Court has adhered to the principle that habeas corpus is, at its core, an equitable remedy. This Court has consistently relied on the equitable nature of habeas corpus to preclude strict rules of res judicata. Thus, for example, in Sanders v. United States, 373 U.S. 1 (1963), this Court held that a habeas court must adjudicate even a successive habeas claim when required to do so by the "ends of justice." Id., at 15-17. The Sanders Court applied this equitable principle even to petitions brought under 28 U.S.C. § 2255, though the language of § 2255 contained no reference to an "ends of justice" inquiry. 373 U.S. at 12-15.

Schlup v. Delo, 513 U.S. 298 (1995) (alternate citations omitted).

To the extent that this Court attempts to inform its decision on the Rule 60(b) determination below by inferring as applicable § 2244(b)(1)'s blanket prohibition of same-claim habeas petitions, it suspends the Writ in violation of the Constitution. Such a result is unacceptable. As the Supreme Court demonstrated in Slack and Felker, the proper course is to interpret AEDPA to avoid the unconstitutional result, incorporating instead "earlier habeas principles" that allow the law and Constitution to coexist. In this case, the dictated course prohibits this Court from informing its Rule 60(b) decision by the contrary terms of AEDPA.

(c) Calderon v. Thompson is inapposite to Mr. Gonzalez's case, both in substance and procedure, making it an inappropriate candidate from which to borrow jurisprudence with which to decide the present case.

Calderon v. Thompson involved the propriety of an appellate court recalling its mandate to "revisit the merits of its earlier decision" about a prisoner who

"already had extensive review of his claims in federal and state courts." 523 U.S. at 557. Thompson's "extensive review" included litigation on the merits of his claims in at least six separate proceedings, and a plenary appeal of a merits decision based on a federal habeas corpus evidentiary hearing. 523 U.S. 545-46. Mr. Gonzalez, on the other hand, has never had a hearing, in state or federal court; has never had an evidentiary hearing, in state or federal court; had his first federal habeas petition erroneously dismissed without consideration of the merits of his claims; and was denied an appeal of that error by the restrictions of AEDPA and a misinterpretation of the COA requirement by this Court, pre-Slack v. McDaniel.

The vehicle by which Thompson sought relief, recall of a mandate, is rarely exercised by appellate courts, the authority for the process is questionable, and there are neither rules, statutes, nor a body of jurisprudence by which to judge its use. The Supreme Court was compelled, therefore, to inform its decision by analogous jurisprudence. To the contrary, Mr. Gonzalez's remedy of choice is a common legal procedure, the authority for which is recognized by rule and a rich body of jurisprudence. Determining the proper application of Rule 60(b) can be accomplished through its own jurisprudence, so resort to analogy is unnecessary. Moreover, resort to the analogy of Calderon v. Thompson conflicts with the established principles of Rule 60(b).

Based on the substantive and procedural differences, analogizing Mr. Thompson's case to Mr. Gonzalez's pending appeal is supported neither by logic nor the law.

(2) Except in cases of fraud on the federal habeas court, is Rule 60(b) relief available only "to avoid miscarriage of justice as defined by our habeas corpus jurisprudence?"

Stated differently, the Court's second question asks: Should the Court of Appeals by judicial fiat repeal the provisions of five subsections of Rule 60(b), ignore decades of Rule 60(b) caselaw and jurisprudence, and apply an unrelated miscarriage of justice jurisprudence in place of the extraordinary circumstances test set forth both in Rule 60(b)(6), and the cases interpreting it? One might add: Should the Court of Appeals do this, even though Congress has not uttered a word about Rule 60(b) in this context, and no other court, including the Supreme Court, has ever done so?[2] We answer: "No."

---

[2] Indeed, this approach was not even within the matrix of possible alternatives discussed by Justice Stevens in his recitation of issues confronting the Court on the viability of 60(b) in habeas cases. Abdur'Rahman v. Bell, 123 S. Ct. 594 (2003) (Stevens, J., dissenting). That case addressed the same type of issue presented by Mr. Gonzalez, whether "'changes in the legal landscape' ... demonstrated that the District Court's procedural bar ruling rested on a mistaken premise, ... constitut[e] a 'reason justifying relief from the operation of the judgment' within the meaning of Rule 60(b)(6)." Yet the universe of alternative answers set forth by Justice Stevens' dissent, whose goal was to illuminate the many issues posed by the question, fails to so much as mention the idea that the Rule 60(b) standard of relief is now different post-AEDPA.

All of the reasons advanced in our answer to the first question are applicable here as well. And we add several additional reasons.

AEDPA neither requires this Court to abandon the plain language of Rule 60(b) and its caselaw, nor does it require this Court to replace that rule and law with another body of law unrelated to the rule's context. As we have demonstrated from the outset, the Rule 60(b) proceeding is freestanding, merely a means to reopen a judgment, not a part of the original habeas corpus proceeding. See APPELLANT'S INITIAL EN BANC BRIEF, at 10-16, EN BANC REPLY BRIEF, at 18-21; Abdur'Rahman, 123 S. Ct. at 594, 597-98. ("It merely ask[s] the District Court to set aside its 1998 order terminating the habeas corpus proceeding and to decide the merits of the ... claim that had been procedurally barred."). So it makes little sense to apply the habeas corpus standard of relief - miscarriage of justice a/k/a actual innocence - to the Rule 60(b) context, which speaks not to the merits of a habeas claim, but merely whether the merits should be reconsidered. Id. This argument is enhanced here, where Mr. Gonzalez was precluded from demonstrating anything, a miscarriage of justice or anything else, due to the district court's erroneous dismissal of the habeas corpus case before any of the underlying merits were heard.

The posture of Mr. Gonzalez's case suggests that the better case for analogy is Slack v. McDaniel, in which the Supreme Court carved out special considerations

for habeas cases reaching the Court of Appeals after a dismissal on procedural grounds. Despite the express language of AEDPA, the Court chose to treat the COA requirement for procedural dismissals differently than for cases decided on the merits. Recognizing that the alternative left petitioners without habeas review or an appeal of that decision, the Court treated procedurally dismissed cases to a special rule, designed to ensure appellate review even where no constitutional appellate issue is present. It did not adopt the harsh miscarriage of justice approach – permitting review only in cases of actual innocence – but rather it recognized that procedurally dismissed cases have never had a merits determination in which miscarriage of justice could be demonstrated. Weighing the importance of the Writ's role in ensuring justice under our Constitution against an potential abolition of that process for procedurally dismissed cases, the Supreme Court opted in favor of a less demanding, not more demanding, standard.

The difference between Rule 60(b) jurisprudence and the miscarriage of justice jurisprudence is vast. In the former case, a wide variety of grounds other than fraud and actual innocence are cognizable, while in the latter case only actual innocence or fraud are cognizable as grounds for relief. It is implausible that Congress intended to delete five of the six paragraphs of Rule 60(b) without ever saying a word on the subject. One of those grounds for relief includes, as alleged

here, an intervening change (correction) in the interpretation of the law, coupled with exceptional circumstances. It seems logically flawed to say that the same Supreme Court that has taken pains to ensure that erroneous habeas corpus procedural decisions should remain open to review, even if lacking appellate issues of constitutional dimension, intends for its more restrictive miscarriage of justice jurisprudence to inform (override) the specific requisites of Rule 60(b). Moreover, as Mr. Gonzalez's case proves, to do so would violate both the Due Process Clause of the Fifth Amendment and, in a separate context, the Suspension of the Writ Clause of U.S. Const. art. I sec. 9, something the Supreme Court has taken pains to avoid. Lonchar v. Thomas, 517 U.S. 314, 324 (1996)("Dismissal of a first federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty."). As the Supreme Court cautioned in Lonchar, to protect the continuing viability of the Great Writ, lower courts are bound to follow the established law, and are "not authorize[d] ... to ignore this body of statutes, rules and precedents," a caution we reiterate in concluding our response to this Court's supplemental suggestions and questions.

Respectfully submitted,

KATHLEEN M. WILLIAMS
Federal Public Defender

Paul M. Rashkind, Supervisory
Assistant Federal Public Defender
Chief of Appeals
150 West Flagler Street, Suite 1500
Miami, Florida 33130-1555
Telephone No. (305) 536-6900 ext. 205

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing was served by U.S Mail this 10th day of July, 2003, upon counsel for appellee, Cassandra K. Dolgin, Assistant Attorney General, Office of the Attorney General, The Capitol, Tallahassee, FL 32399-1050; and by e-mail to Cassandra _Dolgin@oag.state.fl.us, and by FEDEX Overnight to the Clerk of the Court of Appeals.

Paul M. Rashkind

P:\Gonzalez, Aurelio O. Reg\Appeal\Briefs\Supplemental Letter Brief Final.wpd

(5)

Supreme Court, U.S.
FILED
FEB 24 2005
THE CLERK

No. 04-6432

IN THE

Supreme Court of the United States

AURELIO O. GONZALEZ,
Petitioner,

v.

JAMES V. CROSBY, JR.,
Secretary, Florida Department of Corrections,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

JOINT APPENDIX

KATHLEEN M. WILLIAMS
Federal Public Defender
PAUL M. RASHKIND *
Assistant Federal Public Defender
Chief of Appeals
OFFICE OF THE FEDERAL PUBLIC DEFENDER
150 West Flagler Street
Suite 1500
Miami, Florida 33130-1555
(305) 536-6900

Counsel for Petitioner

* Counsel of Record

CHARLES J. CRIST, JR.
Attorney General of Florida
CASSANDRA K. DOLGIN *
Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
The Capitol
Tallahassee, FL 32399-1050
(850) 414-3300 Ext. 3579

Counsel for Respondent

PETITION FOR CERTIORARI FILED JULY 22, 2004
CERTIORARI GRANTED JANUARY 14, 2005

TABLE OF CONTENTS

	Page
Relevant Docket Entries, United States District Court for the Southern District of Florida, Civil Docket No. 97-CV-1935, *Aurelio Gonzalez v. Dept. of Corrections*	1
Relevant Docket Entries, United States Court of Appeals for the Eleventh Circuit, Docket No. 02-12054, *Aurelio O. Gonzalez v. Secretary for the Department of Corrections*	8
Rule 60(b) Motion to Amend or Alter Judgment, Filed in District Court by Aurelio O. Gonzalez, July 30, 2001	13
District Court Order Denying Motion to Amend and Closing Case, Entered March 5, 2002	21
Decision of Eleventh Circuit Court of Appeals (*en banc*) in *Aurelio O. Gonzalez v. Secretary for the Department of Corrections, James Crosby, Secretary*, No. 02-12054, Filed April 26, 2004	22
Constitutional Provisions, Statutes, and Rules Involved	126

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA (MIAMI)

Civil Docket Case No. 97-CV-1935

AURELIO GONZALEZ,
Petitioner,

v.

DEPT. OF CORRECTIONS,
Respondents.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
06/23/97	1	COMPLAINT/Petition for writ of habeas corpus under 28:2254 filed; FILING FEE not paid/in forma pauperis not submitted; B-6; CHS (rn) [Entry date 06/24/97] [Edit date 07/03/97]
		* * *
6/23/97	3	MOTION by Aurelio O. Gonzalez to proceed in forma pauperis with affidavit of prisoner account attached (11) [Entry date 07/17/97]
		* * *
7/2/97	11	ORDER TO SHOW CAUSE: granting [3-1] motion to proceed in forma pauperis, set RESPONSE to Show Cause Order for 9/1/97 (signed by Magistrate Judge Charlene H. Sorrentino on 7/1/97) CCAP (tb) [Entry date 11/18/97]

DATE	NO.	PROCEEDINGS
9/3/97	4	RESPONSE to Order to Show Cause by Dept. of Corrections (Attorney Paulette RoseTaylor) (mpc) [Entry date 09/08/97]
9/3/97	5	APPENDIX to: [4-1] response by Dept. of Corrections (mpc) [Entry date 09/08/97]
10/1/97	7	RESPONSE by Aurelio O. Gonzalez in opposition to [4-1] response (tb) [Entry date 10/07/97]
10/1/97	8	MOTION by Aurelio O. Gonzalez to amend [1-1] complaint (tb) [Entry date 10/07/97]
10/9/97	9	ORDER granting [8-1] motion to amend [1-1] complaint (signed by Magistrate Judge Charlene H. Sorrentino on 10/09/97) CCAP (tb) [Entry date 10/17/97]
11/12/97	10	AMENDED MOTION by Aurelio O. Gonzalez for writ of habeas corpus (tb) [Entry date 11/14/97]
12/10/97	12	RESPONSE by Dept. of Corrections in opposition to [10-1] motion for writ of habeas corpus (tb) [Entry date 12/12/97]
7/16/98	13	REPORT AND RECOMMENDATIONS of Magistrate Judge Charlene H. Sorrentino Signed on: 7/16/98 recommending that the case be dismissed. Case no longer referred. Objections to R and R due by 7/26/98 CCAP (dg) [Entry date 07/22/98]
7/29/98	14	OBJECTION by Aurelio O. Gonzalez to [13-1] report and recommendations (dg) [Entry date 08/04/98]

DATE	NO.	PROCEEDINGS
8/14/98	15	SUPPLEMENT TO 7/16/98 REPORT AND RECOMMENDATIONS of Magistrate Judge Charlene H. Sorrentino Signed on: 8/14/98 CCAP (td) [Entry date 08/19/98]
8/17/98	16	SUPPLEMENTAL REPORT AND RECOMMENDATIONS of Magistrate Judge Charlene H. Sorrentino Signed on: 8/14/98 it remains the recommendation that this petition be dismissed as time-barred CCAP (td) [Entry date 08/19/98]
9/9/98	17	ORDER of dismissal of 2254 petition as time barred, all motions not otherwise ruled upon are dismissed, as moot(signed by Judge Ursula Ungaro-Benages on 9/9/98) CCAP (td) [Entry date 09/11/98]
		* * *
9/11/98	19	OBJECTION by Aurelio O. Gonzalez to [16-1] report and recommendation for dismissal (td) [Entry date 09/14/98]
9/23/98	20	NOTICE OF APPEAL by Aurelio O. Gonzalez of [17-1] order . EOD Date: 9/11/98; Filing Fee: $ FEE NOT PAID; Copies to USCA and Counsel of Record. (nc) [Entry date 10/06/98] [Edit date 04/14/00]
9/23/98	21	MOTION by Aurelio O. Gonzalez to proceed in forma pauperis on appeal (nc) [Entry date 10/06/98]
9/23/98	22	MOTION by Aurelio O. Gonzalez Certificate of Appealability (nc) [Entry date 10/06/98]

DATE	NO.	PROCEEDINGS
		* * *
11/19/98	23	ORDER granting [22-1] motion Certificate of Appealability, denying [21-1] motion to proceed in forma pauperis on appeal (signed by Judge Ursula Ungaro-Benages on 10/19/98) CCAP (vp) [Entry date 11/09/98]
11/3/98	24	ORDER to proceed in forma pauperis on appeal (signed by Judge Ursula Ungaro-Benages on 11/3/98) CCAP (vp) [Entry date 11/10/98]
		* * *
11/2/99	25	MANDATE OF USCA (certified copy) dismissing [20-1] appeal without prejudice and Remanding case to district court for entry of Certificate of Appealability Mandate Issued Date:10/28/99; USCA Appeal #: 98-5545; Copy to Judge. (ep) [Entry date 11/08/99]
11/9/99	26	MOTION by Aurelio O. Gonzalez for certificate of appealability (sn) [Entry date 11/10/99]
12/10/99	27	ORDER denying [26-1] motion for certificate of appealability because the petitioner has failed to make a substantial showing of the denial of a constitutional right and vacating [23-1] order (Signed by Judge Ursula Ungaro-Benages on 12/10/99) CCAP [EOD Date: 12/14/99] (sn) [Entry date 12/14/99]

DATE	NO.	PROCEEDINGS
1/12/00	28	NOTICE OF APPEAL by Aurelio O. Gonzalez of [27-1] order. EOD Date: 12/14/00; Filing Fee: $ FEE NOT PAID; Copies to USCA and Counsel of Record. (ep) [Entry date 01/21/00]
		* * *
2/11/00	31	ORDER GRANTING motion to proceed in forma pauperis on appeal filed on 2/7/00 (not on docket) (Signed by Judge Ursula Ungaro-Benages on 2/11/00) CCAP [EOD Date: 2/15/00] (sn) [Entry date 02/15/00]
		* * *
4/11/00	32	MANDATE OF USCA (certified copy) dismissing [28-1] appeal on the denial of the certificate of appealability Mandate Issued Date: 4/6/00; USCA Appeal #: 00-10329-B; to Judge. (ep) [Entry date 04/14/00]
		* * *
8/2/01	33	MOTION by Aurelio O. Gonzalez to amend [17-1] order, or to Correct judgment (tb) [Entry date 08/03/01]
3/5/02	34	ORDER denying [33-1] motion to amend [17-1] order, denying [33-2] motion to Correct judgment (Signed by Judge Ursula Ungaro-Benages on 3/5/02) [EOD Date: 3/6/02] (tb) [Entry date 03/06/02]
		* * *

DATE	NO.	PROCEEDINGS
4/9/02	36	NOTICE OF APPEAL by Aurelio O. Gonzalez of [34-1] order EOD Date: 3/6/02; Filing Fee: $ FEE NOT PAID; Copies to USCA and Counsel of Record. (ep) [Edit date 07/17/02]
		* * *
5/14/02	38	ORDER denying certificate of appealability (Signed by Judge Ursula Ungaro-Benages on 5/14/02) [EOD Date: 5/15/02] (nc) [Entry date 05/15/02]
		* * *
6/5/02	40	MOTION by Aurelio O. Gonzalez to proceed in forma pauperis on appeal, affidavit and inmate Statement attached (ep) [Entry date 06/12/02]
6/13/02	41	ORDER granting [40-1] motion to proceed in forma pauperis on appeal, affidavit and inmate Statement attached (Signed by Judge Ursula Ungaro-Benages on 06/13/02) [EOD Date: 7/17/02] (ga) [Entry date 07/17/02]
		* * *
1/16/03	43	ORDER of dismissal from USCA (certified copy) denying the application for a Certificate of Appealability is issued in lieu of the mandate of this court [36-1] appeal USCA #: 02-12054-JJ USCA Order Date: 1/10/03 (hh) [Entry date 01/17/03]
		* * *

DATE	NO.	PROCEEDINGS
6/2/04	46	MANDATE OF USCA (certified copy) remanding [36-1] appeal by Aurelio O. Gonzalez Mandate Issued Date: 5/25/04; USCA Appeal #: 02-12054-JJ; Copy to Judge. (hh)
		* * *

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
(Atlanta)

Civil Docket Case No. 02-12054-DD

AURELIO O. GONZALEZ,
Petitioner,

v.

SECRETARY FOR THE DEPARTMENT OF CORRECTIONS,
James Crosby, Secretary,
Respondent.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
04/15/2002	Motion for certificate of appealability construed from the notice of appeal.: Appellant-Gonzalez, Aurelio O. (ProSe)
	* * *
05/16/2002	DC Order: COA Denied: Appellant-Gonzalez, Aurelio O. (ProSe)
	* * *
05/24/2002	ENTRY OF DISMISSAL: Pursuant to 11th Cir. R. 42-1(b), this appeal is hereby dismissed for want of prosecution because appellant has failed to pay the full $100.00 docketing and $5.00 filing fees ($105.00) within the time fixed by the rules.
06/05/2002	Motion to Reinstate Appeal: Appellant-Gonzalez, Aurelio O. (ProSe)

DATE	PROCEEDINGS
06/06/2002	MOT2 (Motion Court Action) issued forwarding IFP to District Court for ruling; motion to reinstate filed here
	* * *
06/17/2002	DC Order: IFP Granted: Appellant-Gonzalez, Aurelio O. (ProSe) Aurelio O. Gonzalez
	* * *
07/12/2002	Motion to Reinstate Appeal is GRANTED. (by WL; issued 7/12/02)
	* * *
08/15/2002	Motion for certificate of appealability construed from the notice of appeal is GRANTED on the following issue only: Whether the district court erred in dismissing appellant's habeas corpus petition. . . (SHB)
	* * *
09/06/2002	Appellant Brief Filed: Appellant-Gonzalez, Aurelio O. (ProSe)
	* * *
10/11/2002	Appellee Brief Filed:PT' D(AOC): Appellee-Moore, Michael W. (Atty: Paulette R. Taylor) M 10/24
10/28/2002	Reply Brief Filed: Appellant-Gonzalez, Aurelio O. (ProSe)
	* * *

DATE	PROCEEDINGS
01/10/2003	PUBLISHED ORDER: The certificate of appealability previously granted in this case is QUASHED AS IMPROVIDENTLY GRANTED, and the appeal is DISMISSED. (SIGNED - EEC) (JFD/EEC/SM)
	* * *
01/27/2003	Motion for Reconsideration: Appellant-Gonzalez. Aurelio O. (ProSe)
	* * *
04/01/2003	Appellant Gonzalez' "Motion to Reconsider, Vacate or Modify" is DENIED AS MOOT. JLE/GBT/RLA/SFB/JFD/SHB/EEC/RB/ FMH/SM/CRW (contained in En Banc order see file for complete text)
	* * *
04/01/2003	Sua Sponte En Banc Rehearing: The Court has determined to hear this case en banc. The Court sua sponte VACATES the 1/10/03 and 8/15/02 Orders. This appeal is hereby REINSTATED. JLE/GBT/RLA/ SFB/JFD/SHB/EEC/RB/FMH/ SM/CRW see file for complete text
	* * *
04/29/2003	En Banc Appellant Brief Filed: (Atty: Paul M. Rashkind)
	* * *
05/23/2003	En Banc Appellee Brief Filed: (Atty: Cassandra Kaye Dolgin)
	* * *
06/04/2003	En Banc Reply Brief Filed: (Atty: Paul M. Rashkind)

DATE	PROCEEDINGS
06/16/2003	Supplemental Authority for Appellee: (Atty: Cassandra Kaye Dolgin (#42804-019))
06/17/2003	Oral Argument Scheduled: En Banc Panel: 06/17/03
06/27/2003	Sent Fax to counsel of supplemental briefing notice
	* * *
07/11/2003	Supplemental Appellant Brief: (Atty: Paul M. Rashkind)
	* * *
07/23/2003	Supplemental En Banc Appellee Brief: (Atty: Cassandra Kaye Dolgin)
	* * *
12/22/2003	Supplemental Authority for Appellant: (Atty: Paul M. Rashkind)
12/29/2003	Supplemental Authority for Appellee: (Atty: Cassandra Kaye Dolgin (#42804-019))
02/17/2004	Supplemental Authority for Appellee: (Atty: Cassandra Kaye Dolgin (#42804-019))
04/26/2004	Judgment Entered
	* * *
04/26/2004	En Banc Opinion Issued COA GRANTED/ AFFIRMED. Opinion also issued in cases 02-12483 & 02-14224.
	* * *
05/25/2004	Mandate Issued
	* * *

DATE	PROCEEDINGS
09/27/2004	Notice of Filing Certiorari: SC #04-6432 Aurelio Gonzalez-: (Atty: Paul M. Rashkind)

* * *

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

CASE NO: 97-1935-CIV

DISTRICT JUDGE UNGARO-BENAGES
MAGISTRATE JUDGE SORRENTINO.
[RCVD BY _____ D.C.]
[01 AUG - 2 AM ____ 12]
[CLARENCE MADDOX]
[CLERK U.S. DIST. CT.]
[S.D. OF FLA. MIA]

AURELIO O. GONZALEZ,
Petitioner,

v.

HARRY K. SINGLETARY,
Respondents,

RULE 60(b) MOTION TO AMEND OR ALTER JUDGEMENT

Aurelio O. Gonzalez, Petitioner, pro-se, pursuant to Federal Rule of Civil Judicial Procedure 60(b)(6), and *Artuz v. Bennett*, 121 S. Ct. 361 (2000), accord *Delancy v. Florida Department of Corrections*, 14 Fla. L. Weekly Fed C 542 (11th Cir. April 6, 2001), respectfully moves this Honorable Court to alter or amend its Judgement and order entered September 9, 1998, in the above-styled cause and, in support, shows:

STATEMENT OF THE CASE

1. On December 8, 1982, Petitioner entered a guilty plea for a sentence of 99 years.

2. On August 8, 1994, Petitioner filed his first motion for postconviction relief in the state trial court.

3. On September 17, 1994, the Honorable Michael B. Chavies, Eleventh Judicial Circuit Court judge, denied Petitioner's Rule 3.850 motion for postconviction relief.

4. On February 8, 1995, the appellatte court affirmed the denial of Petitioner's motion without opinion. Gonzalez v. State, 649 So.2d. 876 (Fla. 3rd. DCA 1995.)

5. On November 25, 1996, Petitioner filed a second motion for postconviction relief in the state trial court.

6. On June 17, 1997, Petitioner filed a Petition for Writ of Habeas Corpus in the United States District Court Southern District, Florida.

7. On September 3, 1997, Respondent filed its response invoking the statute of Limitation, 28 U.S.C. § 2244(d)(1996.)

8. On October 1, 1997, Petitioner filed a response to Respondent's response and motion to amend his petition.

9. On November 12, 1997, Petitioner filed his amended petition.

10. On July 16, 1998, the Magistrate judge Sorrentino issued a report and recommendation recommending that the case be dismissed as the petition was time barred.

11. On July 29, 1998, Petitioner filed objection to the report.

12. On August 14, 1998, the Magistrate judge Sorrentino issued recommending that the case be dismissed as the petition was time barred.

13. On September 9, 1998, the District Court judge Ursula Ungaro-Benages, Southern District, Florida issued an order dismissing the petition as time barred. closing the case.

14. On September 21, 1998, Petitioner filed a Notice of Appeal with a C.O.A. under 2254 Habeas Corpus proceeding Rule 22(b) in the Southern District Court.

15. On October, 19. 1998, the Southern District judge Ursula Ungaro-Benages filed a order "Granting" the Petitioner's motion for Certificate of Appealability.

16. On November 3, 1998, the Southern District Court judge Ursula Ungaro-Benages filed a order allowing the Petitioner to proceed in forma pauperis on appeal.

17. On January 26, 1999, the Eleventh Circuit Court of Appeal filed a memorandum advising the Petitioner to fill out a brief of appeals.

18. On March 8, 1999, Petitioner filed his first INITIAL BRIEF OF APPELLANT in the Eleventh Circuit Court of Appeals.

19. On April 6, 1999, a "BRIEF OF APPELLEE" was filed by the Attorney General Robert A Butterworth in response to the Petitioner/Appellant's brief.

20. On September 28, 1999, the Petitioner/Appellant filed a motion to supplement the record on appeal.

21. On October 28, 1999, the United State Circuit judge denied the Petitioner/Appellant's motion to supplement the record on appeal and dismissed the Petitioner/Appellant's C.O.A. without prejudice. remanding the application for C.O.A. to the Southern District Court for determination of which issues merit appeal under the amended requirements of 28 U.S.C. § 2253 (c.)

22. On November 3, 1999, Petitioner filed his second Certificate of Appeleability in the Southern District Court.

23. On December 6, 1999, Petitioner filed a motion for the Appointment of Counsel for Appeal.

24. On December 10, 1999, the Southern District Court judge Ursula Ungaro-Benages denied Petitioner/Appellant's C.O.A. because the Petitioner/Appellant failed to make a substancial showing of the denial of Constitutional Rights. 28 U.S.C. § 2253(c) (2.)

25. On January 6, 2000, Petitioner filed his second Notice of Appeal to the Southern District Court.

26. On January 13, 2000, Petitioner filed his second BRIEF OF APPELLANT to the Southern District Court.

27. On January 21, 2000, the Southern District Court trasmitted the Petitioner's Notice of Appeal and Brief of Appellant to the Eleventh Circuit Court of Appeals.

28. On January 26, 2000, a response was filed by the Eleventh Circuit Court of Appeals regarding to a C.O.A. will be issued in the appeals court.

29. On January 28, 2000, the Eleventh Circuit Court of Appeal returned Petitioner's brief of appellant "dismissed" by a court order on October 28, 1999.

30. On February 11, 2000, the Southern District Court granted Petitioner's motion for permission to appeal in Forma Pauperis.

31. On April 6, 2000, the Eleventh Circuit Court of Appeals denied the Petitioner/Appellant C.O.A. basing that the appellant failed to make a substancial showing of the denial of Constitutional Rights. 28 U.S.C. § 2253(c)(2)

32. On April 18, 2000, Petitioner filed a Petition for Rehearing to the Eleventh Circuit Court of Appeals.

33. On April 26, 2000, Petitioner's Petition for Rehearing was returned "unfiled" as the appeal was "dismissed" by the court's order of October 28, 1999, stating the appeal was closed.

34. Based on the recent ruling in *Artuz v. Bennett, 121* S.Ct. 361 (2000), Petitioner files this Federal Civil Procedure Rule 60 (b) (5), (6).

ARGUMENT

THE DISTRICT COURT' S ORDER OF DISMISSAL OF PETITION FOR WRIT OF HABEAS CORPUS AS TIME-BARRED SHOULD BE VACATED PURSUANT TO THE RECENT DECISION IN *Artuz V. Bennett* 121 S.Ct. 361 (2000), AND *Delancy v. Fla. Department of Correction, Michael Moore, Sec.*, 26 FLA. L. WEEKLY C 592 (11th Cir.(S.D. FLA.) APRIL 6, 2001.)

35. the District Court Judge dismissed the petition based on the Magistrate Judge's recommendation that the application for writ of habeas corpus was not properly file and, thus, was time-barred pursuant to the AEDPA.

36. the Magistrate Judge's recommendation relied upon the state court's denial of Petitioner's second Rule 3.850 Motion for Postconviction Relief and subsequent state appellate court's affirmance of the denial. Because of the state court's denial, the Magistrate Judge sua sponte found the motion was a successive filling of a Rule 3.850 motion and, thus, not properly filed.

37. the Magistrate Judge erred in finding the motion was not properly filed, and the District Court erred in accepting the recommendation of the Magistrate Judge.

38. "A court considering whether the "tolling Language" of the AEDPA applies must look to the state." (Supplemental Report of Magistrate Judge, p.3).

39. In Florida, a prisoner who seeks postconviction relief can file a Rule 3.850 motion for postconviction relief within two (2) years after the judgement and conviction become final in a noncapital case. Fla.. R. Crim. P. 3.850(b). this rule permits filling a second motion if the first motion was denied

due to its facial insufficiency (e.g., improper or no oath) and not on the merits or when the prisoner alleges new grounds for relief (e.g., newly discovered evidence). *Fla. R. Crim. P. 3.850 (a)(b), (f); accord, Wilkinson v. State*, 750 So.2d 723, 725 n. 3 (Fla. 1st DCA 2000); *Wright v. State*, 741 So. 2d 1146, n.1, 2 (Fla. 2d DCA 1999).

40. Petitioner's first rule 3.850 motion did not contain the required oath. the total court dismissed this motion on the ground it was facially insufficient.

41. Petitioner's second Rule 3.850 motion alleged newly discovered evidence pursuant to the rule's provisions for such claims. However, the motion was not denied because it was improperly filed due to noncompliance with the-rule's filling requirements. Instead, the trial court denied the motion, and the appelate court affirmed the denial, based on the total court's finding that the allegations contained in the motion did not "constitute legal grounds," and was "insufficient in substance to support the relief prayed," clearly alluding to the merits of the claims. (See Exhibit *One*, "Order of Denial"). Nothing in the trial court's order of denial states the motion was successive, time-barred, or otherwise improperly filed. It is indisputable that the motion was properly filed and denied solely on the merits.

42. In *Artuz v. Bennett*, 121 S.Ct. 361 (2000), the Court held that a properly filed postconviction motion is one which meets the filling requirements of the State's postconviction rule, irrespective of the merits of the allegations and issues raised in it. *Id.* Accord, *Delancy v. Florida Department of Corrections, Michael Moore, Sec.*, 14 Fla. L. Weekly Fed. c592 (11th Cir. April 16, 2001).

43. Here, contrary to the finding in the Supplemental Report of the Magistrate Judge (to wit: "State motions for postconviction relief which are successive or time-barred are not properly filed applications which toll the statute of

limitation"), the Court's ruling in *Artuz, supra*, and *Delancy, supra*, now holds otherwise, making successiveness or time-bars issues for the state courts to determine after a filing pursuant to the rule's requirements. *Id. Artuz*, 121 S.Ct. 361 (2000) (". . . the question whether an application has been `properly filed' is quite separate from the question whether the claims contained in the application are meritorious and free of procedural bar"),

> **"An application is `properly filed' when its delivery and acceptance are in compliance with the applicable rule governing filings."**

Id. 121 S.Ct. at 364; accord *Delancy*, 14 Fla. L. Weekly Fed. *C592* (11th Cir. April 6, 2001) (finding that a motion is "properly filed" under § 2244 (d)(2) when the motion, on its face meets state procedural and filing requirements); *Weekly v. Moore*, 14 Fla. L. Weekly Fed. C472a (11th Cir. March 15, 2001) (the court's remand held that in light of *Artuz*, a successive state postconviction motion constitutes a "properly filed" petition for purpose of tolling AEDPA's statute of limitations period).

44. Petitioner's state motion was filed November 26, 1996, into the AEDPA's grace period, met the rule's filing requirements, and was denied on the merits, accord, *Artuz*.

45. therefore, pursuant to *Artuz, Weekly* and *Delancy*, Petitioner requests that this Court's dismissal of his application for writ of habeas corpus as "time-barred" he reversed for further proceedings consistent with *Artuz*, its progeny, and § 2244 (d)(2) of the AEDPA.

WHEREFORE, in the interest of justice, Petitioner prays this Honorable Court grants this motion and reverses this cause for further proceedings. Respectfully submitted,

/s/ Aurelio O. Gonzalez, pro-se
AURELIO O. GONZALEZ
DOC #087467, H3-215-U
Gulf Correctional Institution
500 Ike Steele Road;
Wewahitchka, Florida 32465

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Rule 60(B) MOTION TO AMEND OR ALTER JUDGEMENT" was furnished to: Office of the Attorney General, Miami Regional Office, Criminal Appeals Division, Rivergate Plaza, Suite 958, 444 Brickell Avenue, Miami, Florida 33131, by delivery to the Gulf Correctional Institution mailroom official for mailing by U.S. Mail on this 30 day of July, 2001.

/s/ Aurelio O. Gonzalez, pro-se
AURELIO O. GONZALEZ
DOC #087467, H3-215-U
Gulf Correctional Institution.
500 Ike Steele Road;
Wewahitchka, Florida 32465.

[EXHIBITS OMITTED]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Filed Mar. 5, 2002]

Case No. 97-1935-CIV-UNGARO-BENAGES

AURELIO O. GONZALEZ,
Petitioner,
v.
HARRY K. SINGLETARY,
Respondent.

ORDER DENYING MOTION TO AMEND AND CLOSING CASE

THIS CAUSE is before the Court upon Petitioner's Motion to Amend and Correct (DE 33), filed August 2, 2001.

THE COURT has considered the Motion, the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that the Motion is DENIED. Petitioner already has taken an appeal to the Eleventh Circuit. Accordingly, this Court no longer has jurisdiction over his claims. It is further

ORDERED AND ADJUDGED that this matter is CLOSED.

DONE AND ORDERED in Chambers at Miami, Florida, this 5 day of March, 2002.

/s/ Ursula Ungaro-Benages
URSULA UNGARO-BENAGES
UNITED STATES DISTRICT JUDGE

copies provided:
Magistrate Judge Sorrentino
Aurelio O. Gonzalez, *pro se*

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed April 26, 2004]

No. 02-12054

D. C. Docket No. 97-01935-CV-UUB

AURELIO O. GONZALEZ,
Petitioner-Appellant,

versus

SECRETARY FOR THE DEPARTMENT OF CORRECTIONS,
James Crosby, Secretary,
Respondent-Appellee.

No. 02-12483

D. C. Docket Nos. 96-08752 CR-WJZ &
90-08108 CR-WJZ

EMIL LAZO,
Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeals from the United States District Court for the
Southern District of Florida

No. 02-14224

D. C. Docket No. 99-00023 CV

STEPHEN A. MOBLEY,
Petitioner-Appellant,

versus

DERRICK SCHOFIELD, Warden, Georgia Diagnostic
and Classification Center,
Respondent-Appellee.

Appeal from the United States District Court for the
Northern District of Georgia

(April 26, 2004)

Before EDMONDSON, Chief Judge, TJOFLAT, ANDERSON, BIRCH, DUBINA, BLACK, CARNES, BARKETT, HULL, MARCUS and WILSON, Circuit Judges.*

CARNES, Circuit Judge:

The Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996), clamped down on second and successive petitions filed by state prisoners seeking federal habeas corpus relief under 28 U.S.C. § 2254, and those filed by federal prisoners seeking relief under 28 U.S.C.

---

* Judge William H. Pryor Jr., became a member of the Court on February 20, 2004, which was after this case was submitted for decision, and he did not participate in the decision of it.

§ 2255. *See* 28 U.S.C. §§ 2244(a)-(b), 2255 ¶ 8. Naturally, habeas petitioners and § 2255 movants have sought to circumvent the AEDPA's restrictions on second round collateral attacks in federal courts. One of the most popular vehicles used in the attempted end-runs is a Fed. R. Civ. P. 60(b) motion requesting that the prior judgment denying relief be set aside.

Given the number of cases involved and the importance of the issues, we entered an order granting hearing or rehearing en banc in three cases in order to answer some common questions that have arisen about the use of Rule 60(b) motions to obtain relief from judgments that denied § 2254 relief (in two of the cases before us), or § 2255 relief (in one of the cases). *Gonzalez v. Sec'y of the Dept of Corr.*, 326 F.3d 1175 (11th Cir. 2003). Specifically, we asked each of the three would-be appellants to brief and argue, insofar as it related to his case: 1) whether the certificate of appealability requirement contained in 28 U.S.C. § 2253(c) applies to an attempted appeal of the denial of Rule 60(b) relief from a judgment denying § 2254 or § 2255 relief; 2) if so, whether a certificate of appealability should be issued in his case; 3) what standards should govern Rule 60(b) motions aimed at judgments in § 2254 or § 2255 proceedings, that is, when should they be granted; and 4) was it an abuse of discretion for the district court to deny the Rule 60(b) motion in his case?

I.

We begin with the relevant facts and procedural history of each of the three cases before us, in the sequence in which the panel decisions or orders were issued in them.

A.

A decade ago at a retrial Stephen Mobley was convicted and sentenced to death for the 1991 murder of a Domino's Pizza employee during an armed robbery. *See Mobley v.*

State, 265 Ga. 292, 455 S.E.2d 61 (1995). During the sentencing phase, Mobley introduced as potential mitigating circumstance evidence that he had offered to plead guilty in exchange for any punishment other than death. In rebuttal the prosecution called Andrew Fuller, who had been the district attorney when the prosecution began but no longer was. Fuller testified to the factors which had led him to seek the death penalty. He said those factors included the actual circumstances of the crime, and Mobley's "pure unadulterated meanness" which had been aptly demonstrated by a number of his comments since he killed the victim in cold blood. *Mobley v. Head*, 306. F.3d 1096, 1097-99 (11th Cir. 2001) (Tjoflat, J., dissenting). Fuller also testified that the victim's family supported his decision to seek a death sentence. *Id.* at 1098-99. The victim's family's feelings about the penalty had not carried much weight in his decision; he told the jury that "95 percent of the decision [was] made based on the evidence [he saw] that describe[d] the defendant for [him]." *Id.* at 1099.

Among the issues Mobley raised in his direct appeal was a contention that Fuller should not have been permitted to testify about the factors that influenced him to seek a death sentence in the case. *Mobley*, 265 Ga. at 298-99, 455 S.E.2d at 69-70. The Georgia Supreme Court rejected that contention, after concluding that Fuller's testimony about why he had turned down Mobley's plea offer was relevant since Mobley had put in evidence that he had made the offer. *Id.* The Court, however, had second thoughts about permitting a capital defendant to introduce evidence that he had offered to plead guilty in return for a sentence less than death.

The first thoughts of the Georgia Supreme Court on the subject had come during an earlier appeal Mobley filed following a mistrial due to error at his first trial. *Mobley v. State*, 262 Ga. 808, 426 S.E.2d 150 (1993). Mobley asked the Georgia Supreme Court, which had the case before it primarily to decide a double jeopardy issue arising from the mistrial,

also to decide whether he could introduce evidence at the retrial that he had offered to plead guilty conditioned on not receiving the death penalty. *Id.* at 810-11, 426 S.E.2d at 152-53. The Court said that he could, but that if he did the State would be allowed to explain its reasons for insisting on a death sentence. *Id.* And that is how things played out at the retrial: Mobley put in evidence that he had offered to plead guilty in return for a sentence less than death; and Fuller, the former prosecutor who had rejected that offer, testified about why he had decided nothing less than death would do.

When the case returned to it on direct appeal after the retrial, the Georgia Supreme Court had an opportunity to see the problems that had sprung from the evidentiary box that its ruling in the first appeal had opened. The Court realized that permitting testimony about a defendant's plea offer and the reasons it had been rejected would likely lead to attorneys on both sides testifying and could also put highly inflammatory matters before the jury. Facing up to its mistake, the Court announced that evidence of a defendant's conditional guilty plea offer and its rejection would not thereafter be allowed in Georgia capital cases. *Mobley*, 265 Ga. at 300, 455 S.E.2d at 70 ("[W]e now hold that offers by defendants to plead guilty and testimony of prosecutors regarding their reasons for rejecting such offers are no longer admissible."). It was too late to close that evidentiary box in Mobley's case, of course, but the Georgia Supreme Court decided that neither the testimony concerning the plea offer and its rejection nor anything else that happened at the retrial had been reversible error. It affirmed Mobley's conviction and death sentence. *Id.* at 301, 455 S.E.2d at 71.

Thereafter, Mobley sought state habeas relief which was denied, *see Turpin v. Mobley*, 269 Ga. 635, 502 S.E.2d 458 (1998), and federal habeas relief which was denied by the district court on May 26, 2000, a denial which we affirmed, *see Mobley v. Head*, 267 F.3d 1312 (11th Cir. 2001), cert.

denied, 536 U.S. 968, 122 S. Ct. 2682 (2002) (mem.); our mandate was issued on June 9, 2002.

On July 16, 2002, which was two-and-a-half weeks after the United States Supreme Court denied certiorari in his appeal from the denial of federal habeas relief, Mobley filed an "Extraordinary Motion for New Trial as to Sentence" in state court. That motion sought a new sentencing stage trial where Mobley could present the victim's mother to testify that the family had acquiesced in the prosecutor's decision to seek the death penalty only because they had been unaware that a sentence of life without parole was an option. The state trial court denied Mobley's motion, reasoning that even if the testimony of the victim's mother were presented to a jury, "it [could] not reasonably be concluded that the opposition of the victim's family to the death penalty . . . would probably produce a different verdict." *See Mobley*, 306 F.3d at 1099. Mobley applied to the Georgia Supreme Court for a discretionary appeal of the denial of his motion, but his application was denied. *Id.* His execution was set for August 5, 2002.

On August 2, 2002, Mobley filed in the federal district court a "Motion for Stay of Execution and for Relief from Judgment Pursuant to Fed. R. Civ. P. 60(b)." The judgment he sought relief from is the one the district court had entered on May 26, 2000, denying his § 2254 habeas petition. The district court denied Mobley's Rule 60(b) motion on August 3, 2002 in an order stating that "petitioner concedes, moreover, that the respondent is correct in asserting that pursuant to the current state of the law in the Eleventh Circuit, this motion must be treated as a second or successive habeas action." The district court thought that our prior decision in *Felker v. Turpin*, 101 F.3d 657 (11th Cir. 1996), required that all Rule 60(b) motions in habeas cases be treated as second or successive petitions.

Because it treated Mobley's Rule 60(b) motion as a second or successive habeas petition, the district court was compelled

to reject it. The reason is that Mobley had not obtained an order from this Court permitting the district court to consider a second or successive petition, as he was required to do by § 2244(b)(3)(A); he could not obtain one since the ground upon which relief was sought fit neither of the two circumstances that are set out in § 2244(b)(2). Mobley filed an application for a certificate of appealability so that he could appeal the denial of his Rule 60(b) motion, and the district court denied it.

On August 5, 2002, Mobley came to this Court with the following filings: an application under § 2253(c) for a certificate of appealability so that he could appeal the district court's denial of his Rule 60(b) motion; a motion to recall the mandate this Court had issued on June 9, 2002 in conjunction with our affirmance of the denial of Mobley's first habeas petition; and, a motion for a stay of execution. *Mobley*, 306 F.3d at 1099-1100. That same day, a panel of this Court entered an order staying the execution. *Mobley v. Head*, No. 02-14224 (August 5, 2002) (per Barkett and Wilson, JJ., by quorum).

On September 18, 2002, a panel of this Court, with one judge dissenting, extended the stay of execution that it had previously granted. *Mobley v. Head*, 306 F.3d 1096 (11th Cir. 2002). The panel majority believed that in denying Mobley's Rule 60(b) motion the district court had correctly interpreted our prior *Felker* decision, but anticipated that the Supreme Court would soon decide in *Abdur'Raham v. Bell*, 535 U.S. 1016, 122 S. Ct. 1605 (mem.) (granting certiorari on April 22, 2002), whether all Rule 60(b) motions are subject to the restrictions applicable to second or successive petitions. Wanting the benefit of the upcoming decision in *Abdur'Raham*, the majority granted Mobley a stay without ruling on any of his other applications or motions.

Judge Tjoflat dissented from issuance of the stay of execution, and would have also denied: Mobley's application for a

certificate of appealability; his motion to recall the mandate that had issued in connection with our prior decision in the case; and an application for permission to file a second or successive habeas petition, which Judge Tjoflat thought Mobley had filed in the case, *see* n.19 below. *Mobley*, 306 F.3d at 1098-1107. In Judge Tjoflat's view, the district court and panel majority had misinterpreted our *Felker* decision, which he believed did not and could not have held that all Rule 60(b) motions are to be denied as second or successive petitions. *Id.* at 1102-1105. He suggested instead that, consistent with *Felker*, "a Rule 60(b) motion should only be considered a second or successive habeas corpus petition if the former seeks to assert' constitutional violations and thus is the practical equivalent of the latter." *Id.* at 1104 (internal marks omitted). A claim that the State had perpetrated a fraud on the federal court in order to obtain the judgment denying the habeas petition could be raised in a Rule 60(b)(3) motion, but Mobley's claim alleged at most a fraud on the state court, not one on the federal court. *Id.* at 1105-06. Under Judge Tjoflat's view of the proper relationship of Rule 60(b) and the restrictions on second or successive petitions, Mobley's motion should have been denied by the district court, albeit for different reasons than that court gave.

After Mobley was granted a stay of execution in light of the upcoming decision in *Abdur'Rahman*, the Supreme Court quashed the writ of certiorari in that case as improvidently granted. *Abdur'Rahman v. Bell*, 537 U.S. 88, 123 S. Ct. 594 (2002). Thereafter, we voted to hear the Mobley case en banc. *See Gonzalez*, 326 F.3d at 1176.

B.

The second would-be appellant is Emil Lazo, who was convicted in 1991 of conspiracy to possess with intent to distribute cocaine in violation of 21 U.S.C. § 846, and possession with intent to distribute cocaine, in violation of 21 U.S.C. § 841(a)(1), and was sentenced to 293 months imprisonment.

He appealed, arguing only that the evidence was insufficient to support his conviction, and in 1993 we affirmed his conviction. *See Lazo v. United States*, 314 F.3d 571 (11th Cir. 2002), *vacated for reh'g en banc*, 326 F.3d 1175. (11th Cir. 2003). In 1996 Lazo filed a § 2255 motion to vacate his sentence based on ineffective assistance of counsel at sentencing, and in 1998 the district court denied relief. Lazo requested a certificate of appealability, but the district court denied him one. *See id.* Lazo then came to this Court with an application for a certificate of appealability, and also filed a second request for one in the district court. Both efforts were unsuccessful, and in August 1999 we dismissed Lazo's attempted appeal for lack of a certificate of appealability. *See id.*

In January 2002, Lazo filed a *pro se* motion in the district court styled: "Motion for Relief From Judgment in the Collateral Proceedings filed under 28 U.S.C. § 2255 Pursuant to the Federal Rules of Criminal Procedure 12(b)(2) & Federal Rules of Civil Procedure 60(b)(4) and/or (6) Under the Premise the Otherwise Final Judgment is Void." *See id.* His motion and an accompanying brief put forward the contention that the indictment on which Lazo had been tried in 1991 was insufficient to give the district court subject matter jurisdiction for a number of asserted reasons, including failure to allege interference with interstate or foreign commerce, and failure to provide him with notice of the penalty he faced. Two months after Lazo's motion was filed, the district court summarily denied it. Lazo then filed a notice of appeal. The distract court granted Lazo permission to proceed in forma pauperis, but denied his motion for a certificate of appealability. *See id.* at 573.

When the case reached this Court on Lazo's notice of appeal, a panel characterized the threshold issue as whether Lazo was required to obtain a certificate of appealability before he could appeal the denial of his motion. *See id.* at

573. Inquiring into the true nature of the motion, the panel explained that a § 2255 motion and a Rule 60(b) motion have different purposes. A § 2255. motion is aimed at having a judgment of conviction and sentence set aside because of some constitutional violation, jurisdictional defect, or other ground that makes the judgment subject to collateral attack. In contrast, a Rule 60(b) motion is aimed at having a prior judgment denying § 2255 relief from a conviction and sentence set aside because of some problem with or defect in the proceeding that led to the judgment denying § 2255 relief. *Id.*

Examining the substance of what Lazo had filed in the district court, the panel concluded that it was not a true Rule 60(b) motion, but instead was "the functional equivalent of a successive § 2255 motion." *Id.* It was that, because it did not directly attack the district court's 1998 judgment denying § 2255 relief, but instead went after the 1991 judgment of conviction and sentence on a number of grounds not raised in the earlier § 2255 motion. Because Lazo's latest filing merely raised new grounds of attack on his 1991 conviction and sentence, the panel thought it "readily apparent that the motion is really a successive § 2255 motion in 60(b)'s clothing." *Id.* As a result, the panel concluded that the district court's order denying that motion was indeed "a final order in a proceeding under section 2255" within the meaning of § 2253(c)(1)(B), which requires a certificate of appealability before any appeal can be taken. *Id.* at 573-74.

The panel construed the notice of appeal Lazo had filed as an application to this Court for a certificate of appealability, and denied it because reasonable jurists would not find it debatable whether the district court had properly denied Lazo's latest motion. Given his undisputed failure to obtain the certificate required by § 2255 ¶ 8 before filing what amounted to a second or successive motion, the district court clearly had no choice but to deny that motion. *Id.* at 574-75.

After denying Lazo a certificate of appealability, the panel dismissed his appeal. *Id.* at 575.

We later vacated the panel's order so that we could reconsider the case en banc. *Gonzalez*, 326 F.3d at 1176.

C.

Our final would-be appellant is Aurelio Gonzalez, who was convicted in a Florida state court for robbery with a firearm, and was sentenced to 99 years imprisonment in 1992. He did not file a direct appeal, but in November of 1996 he filed in state court a collateral motion attacking his conviction on grounds of newly discovered evidence which he claimed showed that his guilty plea was unintelligent, unknowing, and involuntary. The state trial court denied relief in December of 1996. Gonzalez appealed, but a state appellate court affirmed. *Gonzalez v. State*, 692 So. 2d 900 (Fla. 3d DCA 1997) (table).

On June 17, 1997, Gonzalez filed a § 2254 petition attacking his conviction on the same grounds he had asserted in the collateral motion he had filed in state court. On September 9, 1998, the district court dismissed his habeas petition as time-barred, on the ground that it had not been filed within the one-year statute of limitations set out in § 2244(d)(1). Initially, the district court granted a certificate of appealability, but we vacated it and remanded for clarification because the certificate did not specify any issues, which was contrary to § 2253(c)(3). On remand the district court reconsidered and denied Gonzalez a certificate of appealability, and on April 6, 2000 so did a judge of this Court. That was the end of Gonzalez's appeal from the dismissal of his habeas petition.

A little over a year later, in July of 2001, Gonzalez filed a Rule 60(b) motion asking the district court to relieve him of its final judgment dismissing his federal habeas petition as time barred. The ground he gave was the intervening Supreme Court decision in *Artuz v. Bennett*, 531 U.S. 4, 121 S. Ct. 361 (2000), which interpreted the "properly filed" clause

of the tolling provision contained in § 2244(d)(2).[1] The district court denied Gonzalez's motion for Rule 60(b) relief on March 5, 2002, and Gonzalez filed a notice of appeal from that denial. The district court declined to grant a certificate of appealability, but a judge of this Court granted one on the issue of whether the district court's September 9, 1998 dismissal of Gonzalez's habeas petition was error.

When the appeal authorized by that certificate reached a panel of this Court for decision, it decided that the issue which had been specified in the certificate of appealability is not directly related to the order Gonzalez is seeking to appeal. *Gonzalez v. Sec'y for the Dept of Corr.*, 317 F.3d 1308 (11th Cir. 2003), *vacated for rehearing en banc*, 326 F.3d 1175 (11th Cir. 2003). Gonzalez is not seeking to appeal the 1998 judgment dismissing his habeas petition; his attempt to appeal that judgment ended unsuccessfully in the year 2000, when he was denied a certificate of appealability for that purpose. What Gonzalez is seeking to appeal now, as the panel explained, is the district court's 2002 order denying his Rule 60(b) motion for relief from the judgment that had dismissed his habeas petition in 1998. *Id.* at 1310. If a certificate of appealability is required for an appeal from the denial of Rule 60(b) relief in a habeas case, Gonzalez needs one focusing on that 2002 order and any of the issues it presents. *Id.*

The *Gonzalez* panel decided that a certificate of appealability is required before an appeal of the denial of Rule 60(b) relief from a judgment denying habeas relief is permitted. In so holding, the panel aligned this circuit with five of the six other circuits that have addressed the issue. *Id.* at 1310-12.

---

[1] 28 U.S.C. § 2244(d)(2) specifies that: "The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." That subsection includes the one-year statute of limitations which had provided the basis for the dismissal of Gonzalez's habeas petition.

The *Gonzalez* decision went beyond that in the *Lazo*, case-which had involved a second or successive petition parading as a Rule 60(b) motion-and "effectively extend[ed] *Lazo's* holding to appeals involving the denial of true Rule 60(b) motions." *Id.* at 1312. The panel characterized Gonzalez's filing as a true Rule 60(b) motion, because it does not assert a new ground for relief from his conviction and sentence or re-assert an old one; instead, the motion is aimed solely at re-opening the judgment that had been entered against Gonzalez in his prior § 2254 proceeding on statute of limitations grounds without regard to the merits of any claims. *Id.* at 1311.

As a ground for re-opening that judgment, Gonzalez's latest motion asserted that *Artuz v. Bennett*, 531 U.S. 4, 121 S. Ct. 361 (2000), had changed the controlling law about which time spent in state post-conviction proceedings is to be excluded from the running of the statute of limitations. The *Artuz* decision, which did change the law of this circuit on that point, *see Weekley v. Moore*, 244 F.3d 874, 876 (11th Cir. 2001), had not been released until just over two years after the judgment dismissing Gonzalez's § 2255 motion as time barred had been entered, and seven months after his efforts to appeal that judgment had ended.

The panel did not imply any view about whether *Artuz* would change the statute of limitations result in the case, *Gonzalez* 317 F.3d at 1314 n.3, concluding instead that even if it would, that is not a valid ground for Rule 60(b) relief. One reason the *Gonzalez* panel gave is that it was bound by the rule announced in *Mobley*, which is that in the post-AEDPA era all Rule 60(b) motions are to be treated as second or successive petitions and denied on that basis unless they fit within the narrow exceptions for them set out in § 2244(b)(2). *Id.* at 1312. The other reason the panel gave is that even without the *Mobley* rule, the result would have been the same in Gonzalez's case; his motion also would have been denied under the pre-AEDPA circuit law governing when judgments

denying habeas relief can be reopened based on changes in the applicable law. *See id.* at 1313. Because the *Gonzalez* panel believed that result was not debatable among jurists of reason, it denied a certificate of appealability in the case and ordered the appeal dismissed. *Id.* at 1313-14.

We later vacated the panel's order and reinstated the case for consideration en banc. *Gonzalez*, 326 F.3d at 1176.

II.

We begin our discussion of the law with this preliminary note. Throughout this opinion we do not distinguish between the three cases before us based upon whether they involve state prisoners and § 2254 law or federal prisoners and § 2255 law, because there is no material difference in the relevant statutory language, *see* § 2253(c)(1)(A) & (B), or in how the issues arising from that language should be resolved. *See Gonzalez*, 317 F.3d at 1311 n.1; *see also Walker v. Crosby*, 341 F.3d 1240, 1249 n.4 (11th Cir. 2003); *compare*. § 2244(b) *with*, § 2255 ¶ 8. What we say in this opinion about certificates of appealability and Rule 60(b) motions as they relate to § 2254 proceedings applies equally to § 2255 proceedings, and vice versa. When we say "habeas petition" we mean to include "§ 2255 motion," and our use of "habeas petitioner" includes "§ 2255 movant" as well.

A.

The *Lazo* and *Gonzalez* panel decisions address the certificate of appealability requirement as it applies to two broad categories of Rule 60(b) motions. *Lazo* concerns the category most frequently seen, which is second or successive § 2255 motions or § 2254 petitions cross-dressed as Rule 60(b) motions. Despite the clothing Lazo put on it, his is not a true Rule 60(b) motion because it does not concern a defect in the earlier § 2255 proceeding which led to the judgment denying relief to Lazo. Stripped to its essence, Lazo's motion attacks

the underlying judgment of conviction and sentence itself on grounds not asserted in the prior § 2255 proceeding. *Lazo*, 314 F.3d at 572-73.

The other category of Rule 60(b) motions are the true ones. An example of them is the motion filed in the *Gonzalez* case. That motion seeks to set aside the prior judgment denying habeas relief on a traditional Rule 60(b) ground for relief from a prior judgment, or at least on a ground that was sometimes used during the pre-AEDPA era. *Gonzalez*, 317 F.3d at 1310-11. The ground is an intervening change in the law applicable to the original § 2254 petition and its claims. *Id.* at 1311; *see generally Ritter v. Smith*, 811 F.2d 1398, 1401 (11th Cir. 1987) (prior to enactment of the AEDPA, Rule 60(b) relief sometimes available as a result of change in the law).

The *Lazo* panel held that the § 2253(c)(1) requirement of a certificate of appealability applies to the denial of a Rule 60(b) motion, at least when the motion is the functional equivalent of a second or successive petition, *Lazo*, 314 F.3d at 573-74, which is to say when it is not a true Rule 60(b) motion. The *Gonzalez* panel took that holding one step further, concluding that a certificate of appealability is required before there can be an appeal of any Rule 60(b) motion, even a true one. *Gonzalez*, 317 F.3d at 1311-12.

B.

We agree with the *Gonzalez* panel that a certificate of appealability is required for the appeal of any denial of a Rule 60(b) motion for relief from a judgment in a § 2254 or § 2255 proceeding. This position is in line with the decisions of five of the six other circuits to consider the question. *See Kellogg v. Strack*, 269 F.3d 100, 103 (2d Cir. 2001); *Rutledge v. United States*, 230 F.3d 1041, 1046-47 (7th Cir. 2000); *Morris v. Horn*, 187 F.3d 333, 336 (3d Cir. 1999); *Langford v. Day*, 134 F.3d 1381, 1382 (9th Cir. 1998); *Zeitvogel v. Bowersox*, 103 F.3d 56, 57 (8th Cir. 1996). The only court of

appeals to go the other way, the Fifth Circuit, has offered no explanation for its different direction. *See Dunn v. Cockrell*, 302 F.3d 491, 492 (5th Cir. 2002).

We find persuasive the explanation the Second Circuit has given for the majority position. *See Kellogg*, 269 F.3d at 103. By its plainterms, the § 2253(c)(1) certificate of appealability requirement applies to "the final order" in a § 2254 or § 2255 proceeding, and Rule 60(b) motions have been considered final orders for appellate purposes in other types of proceedings. *See id.; Stone v. INS*, 514 U.S. 386, 401, 115 S. Ct. 1537, 1547 (1995) (noting that the denial of a Rule 60(b) motion is a separate final order). Because § 2253(c)(1) refers to "the final order," it could be argued that there is only one true final order in each habeas case to which the certificate of appealability requirement applies. However, in the Dictionary Act, which is codified at 1 U.S.C. § 1, Congress has made it clear that in the statutes it enacts, "unless the context indicates otherwise words importing the singular include and apply to several persons, parties, or things. . . ." *See United States v. Fior D'Italia, Inc.*, 536 U.S. 238, 263, 122 S. Ct. 2117, 2133 (2002) ("under the Dictionary Act, 1 U.S.C. § 1, a statutory provision in the singular may include the plural where that would work in the context"); *Barr v. United States*, 324 U.S. 86, 91, 65 S. Ct. 522, 525-26 (1945) (citing 1 U.S.C. § 1 as authority for construing the statutory term "buying rate" to include more than one buying rate); *Dobard v. Johnson*, 749 F.2d 1503, 1509 (11th Cir. 1985) (citing 1 U.S.C. § 1 as authority for the conclusion that "the alternative forum provision of Sec. 2241(d), though phrased in the singular, would have been intended by Congress to be treated as in the plural"). Here, the context does not indicate otherwise, and paying attention to the Congressional command in 1 U.S.C. § 1 carries out the evident intent behind § 2253(c)(1). There is no reason to treat orders denying habeas relief and subsequent orders denying motions to reopen those earlier orders differ-

ently for purposes of the certificate of appealability requirement, and there is every reason to treat them the same.[2]

The certificate of appealability is a threshold or gateway requirement which serves to filter out from the appellate process cases in which the possibility of reversal is too unlikely to justify the cost to the system of a full appellate examination. *See Miller-El v. Cockrell*, 537 U.S. 322, 337, 123 S. Ct. 1029, 1040 (2003) (By enacting the certificate of appealability provisions in the AEDPA, "Congress confirmed the necessity and the requirement of differential treatment for those appeals deserving of attention from those that plainly do not."). There can be no question that the certificate of appealability filter applies when a prisoner is appealing the denial of relief in his collateral attack on the judgment of conviction and sentence itself. *See* 28 U.S.C. § 2253(c).

Given that, it would make no sense to remove the filter when the same prisoner is appealing the denial of Rule 60(b) relief from the judgment denying relief, which is a kind of collateral attack on the rejection of his collateral attack. The more removed an attack is from the judgment responsible for the incarceration of a prisoner, the less likely the attack is to have merit; or, at the least, the less likely it is to have merit that matters. The Second Circuit phrased the same thought this way: "[I]t would be rather anomalous for Congress to

[2] Although it agrees with us that the word "the" in the statutory term "the final order" can be read in the plural, the dissent (we will use "the dissent" throughout this opinion to refer to Judge Tjoflat's separate opinion specially concurring in part and dissenting in part) thinks it should not be read that way unless doing so would carry out the legislative intent behind the certificate of appealability requirement in § 2253(c)(1). Dissenting Op. at 108. We agree with that. Our disagreement with the dissent stems from our recognition that the evident legislative intent behind requiring such certificates in habeas cases was to filter out undeserving appeals with a minimum of judicial effort, and that intent would be frustrated unless "the final order" is interpreted to include final orders denying Rule 60(b) relief in habeas cases.

have intended to screen out unmeritorious appeals from the denials of habeas corpus petitions and yet not have wished to apply this same screen to 60(b) motions seeking to revisit those denials." *Kellogg*, 269 F.3d at 103. Congress sometimes does anomalous things, but the language it used in § 2253(c)(1) does not persuade us that it intended to act in an anomalous and inconsistent way here.

While we respect the dissent's different view on the issue of whether certificates of appealability are required, we find the reasoning behind its view unpersuasive. To begin with, the dissent's criticism of our conclusion on this issue is based at least in part on a misunderstanding of it. The dissent says in Part IV that we are holding a petitioner must apply to this Court for leave to file his Rule 60(b) motion. Dissenting Op. at 113-14. Not so. Rule 60(b) motions must be filed in the district court, not in this Court, and nothing we say is intended to suggest anything to the contrary. Our conclusions have to do with the proper scope of Rule 60(b) motions in habeas proceedings and with whether a certificate of appealability is required to seek review of a district court's denial of one in a habeas proceeding. We change nothing about where Rule 60(b) motions must be filed, which is in the district court. If the motion does not meet the requirements we outline today, the district court must deny it. If a petitioner wishes to appeal the denial of a Rule 60(b) motion aimed at a judgment denying habeas relief, he must obtain a certificate of appealability in order to do so.

The dissent's criticism that no Rule 60(b) motion could ever meet the standards set out for certificates of appealability in § 2253(c)(1) & (c)(2), which provides that they "may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right," is obviously unfounded. *See generally* Dissenting Op. Part IV. Our disposition of two of the cases in front of us proves how unfounded it is. We conclude in Part III of this opinion that two of the three

petitioners are entitled to a certificate of appealability, and we issue each of them one. We do so applying guidance the Supreme Court provided us in *Slack v., McDaniel*, 529 U.S. 473, 120 S. Ct. 1595. (2000), which dealt with certificate of appealability applications to review procedurally based denials in habeas cases. That which is done is not impossible.

Furthermore, a central premise of the dissent's impossibility argument is that the decision of whether to issue a certificate of appealability must be confined to consideration of the debatability of a constitutional issue. It must be, the dissent reasons, because the certificate of appealability standard is whether "the applicant has made a substantial showing of the denial of a constitutional right." *See* § 2253(c)(2). Appealing as it might otherwise be, that reasoning is at war with the Supreme Court's holding in the *Slack* case. Construing and applying the identical statutory language, the Court in *Slack* concluded that in deciding whether to issue a certificate of appealability to permit an appeal from the denial of a habeas petition on procedural grounds, courts must consider the debatability of the procedural ruling, and no certificate may be issued if the petitioner fails to make a substantial showing that the procedural ruling was wrong. 529 U.S. at 484, 120 S.Ct. at 1604. The dissent's position that the certificate of appealability standard cannot be applied to any non-constitutional questions will be news to the Supreme Court, because it is impossible to reconcile that position with the rule the Court announced in *Slack*.

The dissent's position that a certificate of appealability is never required to appeal the denial of Rule 60(b) relief in a habeas case is also contrary to the decisions of other circuits. The dissent attempts to distinguish most of the decisions of the other circuits that have addressed the issue and have concluded that a certificate of appealability is required to appeal a Rule 60(b) denial in a habeas case. It says that in those cases the Rule 60(b) motion was not a "true" one and for that

reason was correctly denied by the district court. Dissenting Op. at 110. But that attempted distinction will not wash. There is nothing in the language or purpose of § 2253(c) that distinguishes between Rule 60(b) motions based upon whether they are "true" ones or not. And the dissent never explains why the nature of the Rule 60(b) motion should determine whether a certificate of appealability is required to appeal from the denial of it.[3] The statutory language covers, and the certificate requirement applies, to all of them or to none. And the clear weight of authority, with which we agree, is that it applies to all of them.

Although the dissent attempts to distinguish much of the precedent against its position with the suggestion that the certificate of appealability requirement applies to the appeals of some but not all Rule 60(b) denials in habeas cases, the dissent's core position seems to be that the certificate of appealability requirement applies to no Rule 60(b) appeals at all.[4] For reasons that should be apparent, that position would reverse the rational order of things. As we have already ex-

---

[3] Going back to the singular versus plural question relating to § 2253(c)'s use of the term "the final order," the dissent's attempt to explain away the other circuits' authority massed against its position would mean that where the Rule 60(b) motion that is denied is a true one, "the final order" was used by Congress in the singular sense; where the motion denied is not a true one, it was used by Congress in the plural sense. *See* Dissenting Op. at 108-09. That bipolar construction does not make sense.

[4] We qualify our description of the dissent's position with "seems to be," because there is some inconsistency about this subject in its opinion. Part III.A of the dissenting opinion clearly asserts the position that the § 2253(c) requirement does not apply to appeals from the denial of any Rule 60(b) motions, because it pertains only to the first order denying habeas relief. Dissenting Op. at 109. Yet, in the very next part of the same opinion, the dissent attempts to reconcile its position with this Court's decision in *Lindsey* (requiring a certificate before an appeal from the denial of a Rule 60(b) motion in that habeas case) by at least implying that a certificate is required if the Rule 60(b) motion is not a true one. *See* Dissenting Op. Part III.B at page 112.

plained, not applying the certificate requirement to a Rule 60(b) denial would make it easier to appeal the rejection of a collateral attack on the denial of habeas relief than it is to appeal the initial denial of habeas relief itself. It would defeat Congress' obvious intent that the certificate of appealability requirement be an important and effective tool to weed out unmeritorious appeals and bring about greater finality of judgment in habeas cases.

The dissent fails to face up to those inescapable and undesirable results of its position. It does not even attempt to explain why Congress would have wanted to cut out clearly non-meritorious appeals from the denial of habeas relief, while at the same time letting all clearly non-meritorious appeals from the subsequent denial of Rule 60(b) in habeas cases proceed to burden the appellate courts and undermine finality of judgment.

The burden would be significant. Under our position a single judge decides whether the appeal from a denial of Rule 60(b) relief has enough arguable merit to proceed—whether the issues it seeks to raise are debatable among jurists of reason. Under the dissent's position, a full-blown appeal with regular briefing and a decision on the merits by a three-judge panel would have to occur every time there is a Rule 60(b) denial in a habeas case and the petitioner elects to appeal. And prisoners will almost always elect to appeal given all the free time on their hands. *See Harris v. Garner*, 216 F.3d 970, 978-79 (11th Cir. 2000) (en banc). The dissent would have the courts of appeal entertain and decide each of those appeals no matter how clearly non-meritorious it appeared from the outset, and no matter whether it was from the denial of the first or fifth or fifteenth Rule 60(b) motion the petitioner had filed. Congress could not have intended that.

For all of these reasons, we conclude that the certificate of appealability requirement applies not only to all final judgments denying § 2254 or § 2255 relief, but also to all final

judgments denying Rule 60(b) relief from those earlier final judgments.[5]

III.

The next question up is whether certificates of appealability should be issued in the three cases before us. Congress has provided that a certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The Supreme Court has explained that this means the petitioner must show "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 1603-04 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4, 103 S. Ct. 3383, 3394 n.4 (1983)); *accord Miller-El v. Cockrell*, 537 U.S. 322, 335-36, 123 S. Ct. 1029, 1039 (2003).

The certificate of appealability requirement is to be administered at the threshold of the appeal, and deciding whether to issue one neither requires nor permits full consideration of the factual and legal merits of the claims, *Miller-El* at 336, 123 S. Ct. at 1039, because "[t]he question is the debatability of the underlying constitutional claim, not the resolution of that debate," *id* at 342, 123 S. Ct. at 1042. That means a petitioner is not required to demonstrate entitlement to appellate relief in order to be given an opportunity to pursue it. Still, the certificate of appealability requirement is not a toothless one, and it should be applied with its purpose in mind, which is to separate out those appeals that deserve more careful attention from that do not. More than the absence of frivolity or the

---

[5] In Part IV of its opinion the dissent recasts our conclusions and the rules we announce. We reject that recasting, and we remind the reader that in any decision of this Court the law of the circuit is contained in the majority opinion, not in the dissenting opinion's description of it.

presence of good faith is required for a petitioner to clear this hurdle. *Id.* at 335-38, 123 S. Ct. at 1039-40.

Of particular relevance to the three cases we have before us, each of which involves Rule 60(b) procedural issues in addition to merits issues, is the *Slack* decision. In that case the district court had denied the habeas petition on procedural grounds without reaching the underlying constitutional claim. *Slack*, 529 U.S. at 484, 120 S. Ct. at 1604. The Supreme Court held that in those circumstances a certificate of appealability should issue only if the petitioner makes both a substantial showing that he had a valid claim of the denial of a constitutional right, and a substantial showing that the procedural ruling is wrong. *Id.* at 484, 120 S. Ct at 1604. Those are the two components of the showing a petitioner in that situation must make in order to be entitled to a certificate of appealability. If either of the components is lacking, a court may deny the application for a certificate because of the absence of that component without deciding whether the other one exists. *Id.* at 485, 120 S. Ct. at 1604 ("Each component of the § 2253(c) showing is part of a threshold inquiry, and a court may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments.").

A.

With these principles in mind we turn to the specific cases. The easiest case in which to decide the certificate of appealability question is *Lazo*. The underlying constitutional claim in that case asserts that the indictment charging Lazo with conspiracy to possess with intent to distribute cocaine, and possession with intent to distribute cocaine, was insufficient to give the district court subject matter jurisdiction because of its failure to allege an effect on interstate or foreign commerce, and its failure to provide Lazo with specific notice of the penalty he faced. There is no basis at all for those claims.

An examination of the indictment, which is in the record before us, reveals that it is fully adequate in all respects. Lazo's contentions that the indictment is defective are not debatable among reasonable jurists. Because he has failed to make a substantial showing of the denial of a constitutional right, we deny him a certificate of appealability on that basis. We do so without reaching the procedural component of the required showing, which is whether any of the Rule 60(b) motion issues that his case gives rise to are debatable among jurists of reason.

B.

Gonzalez's claim is a different matter. He contends that his guilty plea was unintelligent, unknowing, and involuntary based upon specific evidence he has proffered. From the record before us, which does not contain a transcript of the guilty plea proceeding (there is some indication no transcript exists), we cannot say that Gonzalez's claim is not debatable among jurists of reason. Therefore, his appeal cannot be dispensed with at the certificate of appealability stage on the basis of the constitutional claim component.

As for the procedural component, Gonzalez must show that it is debatable among jurists of reason whether the intervening decision in *Artuz v. Bennett*, 531 U.S. 4, 121 S. Ct. 361 (2000), entitles him to Rule 60(b) relief from the prior judgment denying habeas relief on statute of limitations grounds. Rule 60(b) relief may not be available in these circumstances, but before we decide (a little later in this opinion) what standards apply in the post-AEDPA era to Rule 60(b) motions in habeas cases, we cannot say Gonzalez's position on that procedural issue is not debatable among jurists of reason. Accordingly, we will grant Gonzalez a certificate of appealability and proceed to a full consideration of his appeal.

In keeping with the dictates of § 2253(c)(3), we specify the issues on which the certificate is granted as being the last two

for which we requested en banc briefing in this case: What standards are applicable to Rule 60(b) motions in § 2254 cases, and in light of those standards was it an abuse of discretion for the district court to deny the motion?

C.

As in Gonzalez's case, so also in Mobley's case. His constitutional claim may lack merit, but we cannot say based upon the record before us that it is not debatable among jurists of reason. The same is true of the procedural issues arising from his case. Until we decide what standards apply to Rule 60(b) motions in habeas cases, Mobley's position that he is entitled to relief from the judgment denying him habeas relief is debatable among jurists of reason. So he, too, gets a certificate of appealability, and it is one specifying the same two issues we specified for Gonzalez.

IV.

Having decided that the § 2253(c) certificate of appealability requirement does apply to appeals from denials of Rule 60(b) relief in habeas cases, and that a certificate of appealability ought to be issued in the Gonzalez and Mobley cases, we turn now to the third issue for which we granted en banc review.[6] What standards govern Rule 60(b) motions aimed at judgments in habeas proceedings, that is, when should those motions be granted?

---

[6] We offer this explanation about the way we are proceeding. We realize, of course, that our procedure for dealing with the cases we have before us does not follow the usual course in these matters. Ordinarily, whether to grant a certificate of appealability in a case is decided first, and if a certificate is granted full briefing on the issues specified in the certificate follows. In this en banc case, we have collapsed the briefing on the certificate of appealability issues with that about the proper scope of Rule 60(b) motions in § 2254 and § 2255 cases, because we determined that this is the most efficient way to decide all of the issues. The parties were given ample opportunity to fully brief and to argue all of the issues we decide here.

A.

This question is critically important because of the consistent direction and the substantial extent to which limitations on second or successive petitions have evolved. The evolution has been toward greater finality of judgments through increasingly tight restrictions on second or successive petitions. We have gone from the days of the more permissive ends of justice and abuse of the writ standards, *see, e.g., Sanders v. United States*, 373 U.S. 1, 12, 83 S.Ct. 1068, 1075 (1963); to the post-*McCleskey* era with its less permissive cause and prejudice standard, *see, e.g., McCleskey v. Zant*, 499 U.S. 467, 493, 111 S. Ct. 1454, 1470 (1991); *Sawyer v. Whitley*, 505 U.S. 333, 338, 112 S. Ct. 2514, 2518 (1992); to the present post-AEDPA times, with a total ban on claims that were presented in a prior petition, § 2244(b)(1), and anear-total ban on those that were not, *see* § 2244(b)(2).

The central purpose behind the AEDPA was to ensure greater finality of state and federal court judgments in criminal cases, and to that end its provisions greatly restrict the filing of second or successive petitions. The Supreme Court and this Court have made these points many times before. *See Miller-El v. Cockrell*, 537 U.S. 322, 337, 123 S. Ct. 1029, 1039-40 (2003) ("Statutes such as AEDPA have placed more, rather than fewer, restrictions on the power of federal courts to grant writs of habeas corpus to state prisoners."); *Tyler v. Cain*, 533 U.S. 656, 661, 121 S. Ct. 2478, 2481-82 (2001) ("AEDPA greatly restricts the power of federal courts to award relief to state prisoners who file second or successive habeas corpus applications."); *Williams v. Taylor*, 529 U.S. 420, 436, 120 S. Ct. 1479, 1490 (2000) ("AEDPA's purpose [is] to further the principles of comity, finality, and federalism"); *Calderon v. Thompson*, 523 U.S. 538, 558, 118 S. Ct. 1489, 1502 (1998) ("AEDPA's central concern [is] that the merits of concluded criminal proceedings not be revisited in the absence of a strong showing of actual innocence.");

Johnson v. United States, 340 F.3d 1219, 1224 (11th Cir. 2003) ("It is generally accepted that one of the principal functions of AEDPA was to ensure a greater degree of finality for convictions."); *Jones v. United States*, 304 F.3d 1035, 1039 (11th Cir. 2002) ("A fundamental purpose for the AEDPA was to establish finality in post-conviction proceedings.").

That central purpose of the AEDPA and its provisions specifically restricting the filing of second or successive petitions severely limit the application of Rule 60(b) to habeas cases. Rule 11 of the Rules Governing § 2254 Cases provides that the Federal Rules of Civil Procedure "may be applied, when appropriate" in habeas proceedings, but only "to the extent that they are not inconsistent with these rules." Rule 11, 28 U.S.C. fol. § 2254. Given that the habeas rules trump the civil ones to the extent of any inconsistency, it certainly follows that statutory provisions governing habeas proceedings also trump general civil rule provisions that are inconsistent, and that is especially true of subsequently enacted statutory provisions such as those in the AEDPA. The civil rules themselves explicitly recognize as much by providing that they are applicable to habeas corpus proceedings only "to the extent that the practice in such proceedings is not set forth in statutes of the United States" or in the habeas rules. Fed. R. Civ. P. 81(a)(2).[7]

[7] The habeas rules, too, will soon explicitly recognize the obvious point that the civil rules do not apply to habeas proceedings to the extent that they are inconsistent with any statutory provision. The Judicial Conference has approved and recommended to the Supreme Court a revision of the habeas rules, which includes the following restyled Rule 12: "The Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, *to the extent that they are not inconsistent with any statutory provision* or these rules, may be applied to a proceeding under these rules." *Proposed Amendments to Proceedings under 28 U.S.C. § 2255* (emphasis added). The accompanying committee note states that the change is intended to be stylistic only and that no substantive change is being made. *Id.*

There's a different way of explaining the same point. Congress allowed Rule 60(b) to be created through the Rules Enabling Act process, *see generally*, 28 U.S.C. §§ 2071-2077, by not exercising its legislative authority to veto or modify that rule, *see* § 2074. Congress can supercede Rule 60(b) or any other rule promulgated through the rules process by actively asserting its legislative authority to enact provisions that govern procedure. The AEDPA with its restrictions on the filing of second or successive petitions, *see* 28 U.S.C. § 2244(b), is an example of Congress doing that to some extent.

Regardless of how one explains it, if the earlier adopted rule is inconsistent with the later enacted statutory provision, the rule yields to the statute to the extent of the inconsistency. And unless its operation is throttled back in habeas cases, Rule 60(b) is inconsistent with § 2244(b). Applying Rule 60(b) full throttle to final judgments in habeas cases would essentially repeal the later-enacted AEDPA provisions restricting second or successive petitions. The rule's provisions are broadly worded and permit judgments to be reopened "upon such terms as are just" for any number of reasons, including to correct a mistake, to undo the result of inadvertence, or to remedy excusable neglect, Fed. R. Civ. P. 60(b)(1); or because of newly discovered evidence, Fed. R. Civ. P. 60(b)(2); or for "any other reason justifying relief from the operation of the judgment," Fed. R. Civ. P. 60(b)(6).[8] The

[8] Rule 60(b) provides that the court may relieve a party from a final judgment, order or proceeding:

> for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud . . . misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective

latitude that the rule gives courts to reopen final judgments is frequently described as a "broad discretion." *See, e.g.*, *Bennett v. Dr. Pepper/Seven Up, Inc.*, 295 F.3d 805, 807 (8th Cir. 2002) ("We will reverse a district court's ruling on a Rule 60(b) motion only if there was a clear abuse of the court's broad discretion."); *Marquip, Inc. v. Fosber America, Inc.*, 198 F.3d 1363, 1369 (Fed. Cir. 1999) ("[T]his court detects no abuse of the district court's broad discretion to apply Rule 60(b)."); *Hoult v. Hoult*, 57 F.3d 1, 3 (1st Cir. 1995) ("We note at the outset that district courts enjoy broad discretion in deciding motions brought under Rule 60(b)."); *Lee v. Village of River Forrest*, 936 F.2d 976, 979 (7th Cir. 1991) ("A trial judge has broad discretion to grant Rule 60(b) relief from judgment.").

Most of the provisions of Rule 60(b), which vest courts with broad discretion to reopen judgments on a wide variety of grounds, are inconsistent and irreconcilable with the AEDPA's purpose, which is to "greatly restrict[] the power of federal courts to award relief to state prisoners who file second or successive habeas corpus applications," *Tyler v. Cain*, 533 U.S. at 661, 121 S. Ct. at 2481-82, and with its "central concern that the merits of concluded criminal proceedings not be revisited in the absence of a strong showing of actual innocence," *Calderon*, 523 U.S. at 558, 118 S. Ct. at 1502. Consider, for example, Rule 60(b)(2), which permits the reopening of a final judgment based upon newly discovered evidence. If that rule were applied in habeas cases it would effectively erase from the books the more recent and more specific statutory requirement that final judgments denying habeas relief not be reopened or set aside because of newly

---

application; or (6) any other reason justifying relief from the operation of the judgment.

The motion must be made "within a reasonable time," and for reasons (1), (2), and (3), "not more than one year after the judgment, order, or proceeding was entered or taken." Fed. R. Civ. P. 60(b).

discovered evidence, unless "the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense," § 2244(b)(2)(B)(ii). And Rule 60(b)(1), which permits a court to reopen a final judgment to undo a litigation loss that resulted from "mistake, inadvertence, surprise, or excusable neglect," would have the same vitiating effect.

No part of the rule, if it were applied to habeas cases, could do more harm to the finality of judgments and the interests protected by the AEDPA than Rule 60(b)(6) which permits reopening a final judgment for "any other reason justifying relief from the operation of the judgment." As Judge Tjoflat has explained, limiting the operation of Rule 60(b)(6) in habeas cases is critically important, because "[a] district court that uses this 'catch-all' provision to allow a habeas corpus petitioner to obtain review of a new constitutional claim will . . . eviscerate the provisions of AEDPA." *Mobley*, 306 F.3d at 1101 n.3 (Tjoflat, J., dissenting).

The discretion to reopen final judgments contemplated in most of the provisions of Rule 60(b) cannot co-exist in a habeas case with § 2244(b). That statutory provision, whose second or successive petition restrictions are "grounded in respect for the finality of criminal judgments," *Calderon*, 523 U.S. at 558, 118 S. Ct. at 1502, explicitly forbids setting aside final judgments denying habeas relief except in rare circumstances that fit within the two narrow exceptions contained in that statutory provision. The severe restrictions on revisiting final judgments that are contained in § 2244(b) are virtually the antithesis of the broad discretion that Rule 60(b) generally gives district courts to reopen them.

We reject, because Congress in enacting the AEDPA has rejected, any notion that habeas proceedings are just another category of civil cases for purposes of Rule 60(b). Or, to put it in terms of the Federal Rules of Civil Procedure them-

selves, we conclude that insofar as reopening final judgments in habeas cases is concerned, "the practice in such proceedings is [ ] set forth in statutes of the United States," *see* Fed. R. Civ. P. 81(a)(2), and specifically in § 2244(b).

That means Rule 60(b) cannot and does not apply in habeas cases the way it does in ordinary civil cases, but it does not necessarily mean that no aspect of the rule has any relevance to habeas cases. It may have some limited role to play in habeas cases; that is, there may be some aspect of Rule 60(b) that is not inconsistent with the AEDPA. For guidance about what limited role Rule 60(b) might play in habeas cases we look to the Supreme Court's *Calderon* decision, which involves the closest analogy (the recall of appellate mandates in habeas cases) we can find and provides some compelling reasoning.

B.

The *Calderon* case had a lengthy procedural history, but the relevant part of it for our purposes began after a panel of the Ninth Circuit reversed a district court's grant of habeas relief as to the rape-murder conviction and death sentence of the petitioner, Thomas Thompson. The district court had granted that relief after concluding that Thompson had suffered from ineffective assistance of counsel, but the panel disagreed. *See Calderon*, 523 U.S. at 544-46, 118 S. Ct. at 1495-96. After rehearing en banc was denied, the appellate mandate directing the district court to deny all relief was issued. *Id.* at 546, 118 S.Ct at 1496.

Thompson then brought forward new evidence that there had been no rape; he had found a witness who would testify to having seen the victim engaged in what appeared to be consensual sex with Thompson on the night she was murdered. Thompson filed in the court of appeals a motion to recall the mandate, and the next day he filed in the district court a Rule 60(b) motion to set aside the judgment denying

him habeas relief that had been entered in obedience to the appellate court's mandate. Both motions were based on the new evidence that there had been no rape because the sex had been consensual. *Id.*

In denying Thompson's Rule 60(b) motion, the district court construed it to be a successive petition under § 2244, and explained that "Thompson 'must not be permitted to utilize a Rule 60(b) motion to make an end-run around the [statutory] requirements'" of the AEDPA governing second or successive petitions. *Id.* at 547, 118 S. Ct. at 1496. Even with his new witness, in view of the other evidence against him, Thompson could not show that he was actually innocent so that his execution would be a miscarriage of justice. *Id.* at 547, 118 S. Ct. at 1496-97.

The Ninth Circuit panel denied Thompson's motion to recall the appellate mandate, but two days before he was scheduled to be executed the en banc court voted to recall the mandate, which had been issued 53 days earlier. *Id.* at 547-48, 118 S. Ct at 1497. The en banc court did so not on the basis of the new evidence asserted in Thompson's motion to recall, but instead acted sua sponte based solely on the claims and evidence that had been presented in his first habeas petition, the one that had led the district court to grant relief originally only to be reversed by the panel. The en banc court gave two reasons for recalling the mandate.

One reason was that rehearing en banc would have been granted before the mandate issued but for procedural misunderstandings and mistakes within the court itself. The other reason was that the panel's decision reversing the grant of habeas relief "would lead to a miscarriage of justice." *Id.* at 548, 118 S. Ct. at 1497. The miscarriage of justice the en banc court perceived was that the panel decision was wrong. It held that Thompson had been denied effective assistance of counsel and directed the district court to issue the writ on that ground. In doing so, the en banc court made no effort to

determine if Thompson was actually innocent of the crime. *Id.* at 548-49, 118 S. Ct. at 1497.

The Supreme Court reversed the en banc Ninth Circuit's decision. In doing so, the Court acknowledged that generally the power of a court of appeals to recall its mandate is inherent and unquestioned. *Id.* at 549-50, 118 S. Ct. at 1498. Habeas cases, however, are different, and that difference matters when it comes to reopening final judgments. The *Calderon* opinion explains that because of "the profound societal costs that attend the exercise of habeas jurisdiction," the Court had "found it necessary to impose significant limits on the discretion of federal courts to grant habeas relief." *Id.* at 554-55, 118 S. Ct. at 1500. Among the examples given in the opinion are the limitations the Court had imposed on the ability of lower courts to consider second petitions, to consider procedurally defaulted claims, and to consider claims that are based upon new decisional law. *Id.*

Underlying those limitations imposed by its decisions is what the Supreme Court characterized as "our enduring respect for the State's interest in the finality of convictions that have survived direct review within the state court system." *Id.* at 555, 118 S. Ct. at 1500 (citations and marks omitted). Finality of judgment is of critical importance to our criminal justice system, the Court explained, because finality is "essential to both the retributive and the deterrent functions of criminal law," it "enhances the quality of judging," and it "serves as well to preserve the federal balance." *Id* at 555, 118 S. Ct. at 1501.

The interest in finality of judgment, which is of considerable importance when state review of a conviction and sentence has been completed, becomes truly compelling, in the Supreme Court's view, after a federal court of appeals has issued a mandate denying habeas relief. At that point, the State is entitled not simply to an assurance of finality but, to use terms from the *Calderon* opinion, to "real finality" or

"actual finality." *Id.* at 556-57, 118 S. Ct. at 1501-02. Because mandate recalls threaten that entitlement and the critical interests that underlie it, their field of permissible use is severely restricted in habeas cases.

Or, as the Supreme Court said, when judging the propriety of any exercise of the power to recall a mandate, "we measure it not only against standards of general application, but also against the statutory and jurisprudential limits applicable in habeas corpus cases." *Id.* at 553, 118 S. Ct. at 1499. Of course, the most relevant statutory limits are those in § 2244(b) which stringently restrict consideration of second or successive petitions. Because what the Court said about the application of those provisions to mandate recall motions bears so directly on Rule 60(b) motions in habeas cases, it is worth a block quote:

> In a § 2254 case, a prisoner's motion to recall the mandate on the basis of the merits of the underlying decision can be regarded as a second or successive application for purposes of § 2244(b). Otherwise, petitioners could evade the bar against relitigation of claims presented in a prior application, § 2244(b)(1), or the bar against litigation of claims not presented in a prior application, § 2244(b)(2). If the court grants such a motion, its action is subject to AEDPA irrespective of whether the motion is based on old claims (in which case § 2244(b)(1) would apply) or new ones (in which case § 2244(b)(2) would apply).

Id. at 553, 118 S. Ct. at 1500. That would have been the end of the case, if the mandate recall in *Calderon* had come as a result of the petitioner's motion. *See id.* at 562, 118 S. Ct. at 1504 ("Had [the en banc court] considered the additional evidence or claims presented in Thompson's motion to recall the mandate, of course, its decision would have been subject to § 2244(b).").

More analysis was required in that case, however, because of a procedural wrinkle: The en banc Ninth Circuit had insisted that it did not recall the mandate based upon anything contained in Thompson's motion, but instead coincidentally recalled its mandate sua sponte based solely upon the claims contained in the original habeas petition and the evidence that had been presented in support of that petition. *Id.* at 548, 554, 118 S. Ct. at 1497, 1500. This procedural wrinkle potentially mattered because the text of § 2244(b) covers only court action pursuant to a petitioner's application. *See id.* at 554, 118 S. Ct. at 1500; *see also* § 2244(b)(1) ("A claim presented in a second or successive habeas corpus application . . . ."); § 2244(b)(2) ("A claim presented in a second or successive habeas corpus application . . . .").

Because the recall of the mandate had not been based upon Thompson's motion and the en banc court had not considered anything contained in that motion in making its decision, the Supreme Court acknowledged that the terms of § 2244(b) did not govern the peculiar circumstances of that specific mandate recall. *Id.* at 554, 118 S. Ct. at 1500. It made little difference that § 2244(b) technically did not apply, however, because the Supreme Court held that even where a post-judgment situation does not fit within the actual terms of the AEDPA, a court "must exercise its discretion in a manner consistent with the objects of the statute," and "the court must be guided by the general principles underlying our habeas corpus jurisprudence." *Id.* Guided by those principles and with an eye on the objects of the AEDPA, the Court concluded that even though sua sponte mandate recalls are not within the literal terms of the statute, none should be granted unless necessary to prevent a miscarriage of justice, as that term is defined in the pre-AEDPA habeas corpus jurisprudence. *Id.* at 557-58, 118 S.Ct. at 1502.[9]

[9] The Supreme Court drew the actual innocence standard it announced for sua sponte mandate recalls from its decision in *Schlup v. Delo*, 513 U.S. 298, 115 S. Ct. 851 (1995), instead of using the one contained in § 2244(b)(2)(B). *See Calderon*, 523 U.S. at 559-60, 118 S. Ct. at 1502-03. There are some differences between the two standards. For example, under the Schlup formulation when the constitutionality of the conviction is at issue because of new evidence, the standard is whether "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Schlup*, 513 U.S. at 327, 115 S. Ct. at 867, *quoted in Calderon*, 523 U.S. at 559, 118 S. Ct. at 1503. By contrast, under § 2244(b)(2)(B) the standard is whether it has been established "by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the petitioner guilty of the underlying offense."

The miscarriage of justice standard is appropriate in that situation, the Court reasoned, because it "comports with the values and purposes underlying AEDPA," even though the AEDPA provisions did not literally apply in that case because the en banc court action had not been based upon the petitioner's motion. *Id.* at 558, 118 S. Ct. at 1502. The miscarriage of justice standard was recognized by the Court to be "altogether consistent . . . with AEDPA's central concern that the merits of concluded criminal proceedings not be revisited in the absence of a strong showing of actual innocence." *Id.* Actual factual innocence is required; legal innocence is not enough. It is a narrow and well-defined exception that will rarely be found to exist. *Id.* at 559, 118 S. Ct. at 1502-03.

C.

The lessons about reopening a final habeas judgment that we draw from the *Calderon* decision and opinion are that Rule 60(b) relief should not be granted from a judgment denying habeas relief unless a demanding standard is met, and which of two demanding standards applies depends on whether the recall results from a motion made by the petitioner or is done on the court's own initiative. If the recall is based on a motion by the petitioner, that motion is the functional equivalent of a second or successive petition and

the terms of the AEDPA's § 2244(b) apply regardless of the label put on it. If, on the other hand, a court of appeals is considering recalling the mandate on its own motion the literal terms of § 2244(b) do not apply, but the mandate cannot be recalled unless necessary to prevent a miscarriage of justice; that means the petitioner must be factually innocent of the crime, or of the sentence, as defined in the pre-AEDPA federal habeas jurisprudence, see n.9, above.

The Supreme Court in *Calderon* indicated that only two exceptions apply to the rule that the final judgment in a habeas case may not be reopened by a recall of the mandate unless the demanding standard that applies is met. One exception is that the mandate may be recalled to correct a mere clerical error in the judgment. *Id.* at 557, 118 S. Ct. at 1501. The other exception is that the mandate may be recalled where there was "fraud upon the court, calling into question the very legitimacy of the judgment." *See id.* at 557, 118 S.Ct. at 1501-02. Neither situation was present in the *Calderon* case, nor did the petitioner meet the demanding standard (actual innocence) that applied there. As a result, the judgment of the Ninth Circuit en banc court recalling the mandate and affirming the grant of federal habeas relief to Thompson was reversed. *Id.* at 566, 118 S. Ct. at 1506.

D.

Calderon's lessons about whether and when an appellate court's power to recall a mandate may be used in habeas cases apply with as much force to the question of whether and when a trial court's Rule 60(b) authority to reopen a final judgment may be used in a habeas case. Recalling the mandate to reopen and alter the final judgment in a habeas case is the closest thing on the appellate level to the use of Rule 60(b) to reopen and change a final judgment at the trial level. The unfettered application of either procedure to reopen final judgments in habeas cases would undermine important prin-

ciples and values protected by the restrictions contained in habeas decisional law and the AEDPA.

The Supreme Court emphasized in *Calderon* "our enduring respect" for a state's interest in the finality of a judgment that has survived review within the state system, and it stressed that finality of judgments is essential to the proper functioning of the criminal justice system and to preservation of the federal balance. *Calderon*, 523 at 555-56, 118 S. Ct. at 1500-01. Our enduring respect for the interests behind finality of criminal judgments, and our understanding that finality is essential to criminal justice and to our federal system, does not vary depending on whether the threat to finality comes from a motion to recall the mandate or from a Rule 60(b) motion. When a federal appellate court has issued a mandate denying habeas relief, the state's interests in finality of a judgment of its courts are no less "compelling," *id.* at 556, 118 S. Ct. at 1501, and its entitlement to "real finality" and "actual finality" is not diminished simply because the petitioner's attempt to reopen the judgment is wrapped in Rule 60(b) packaging instead of mandate recall paper. The interests threatened and the importance of those interests are the same regardless of whether the attack comes at the district court or appellate level. A reopened judgment is a reopened judgment.

Two differences between Rule 60(b) relief and mandate recalls come to mind, but neither weighs in favor of permitting the former to undermine finality of criminal judgments any more than the latter. One difference is that the procedure for obtaining relief from a judgment at the district court level is set out in Rule 60(b), while there is no comparable Federal Rule of Appellate Procedure that sets out the procedure for recalling a mandate once it has issued, *see generally* Fed. R. App. P. 41(governing mandates). Rule 60(b), however, provides only the procedural framework, while the substantive law governing relief from judgments at

the trial level is supplied by decisional law, *see* Fed. R. Civ. P. 60(b) advisory committee's note ("It should be noted that Rule 60(b) does not assume to define the substantive law as to the grounds for vacating judgments, but merely prescribes the practice in proceedings to obtain relief."), just as the substantive law applicable to mandate recalls is to be found in court decisions, *see Calderon*, 523 U.S. at 549-50, 118 S. Ct. at 1498 ("the courts of appeals are recognized to have an inherent power to recall their mandates, subject to review for an abuse of discretion"). So, there is no real difference in that respect. And in any event, Rule 60(b) is itself subject to the limitation of Rule 81(a)(2), which provides that the rule does not apply to habeas corpus proceedings to the extent that the practice in them is set forth in statutes, and the AEDPA is such a statute.

The other difference between Rule 60(b) relief and mandate recalls is that an appellate court generally has less discretion to reopen judgments by recalling its mandate than a district court has to reopen them under Rule 60(b). *Compare Calderon*, 523 U.S. at 549-50, 118 S. Ct. at 1498 (power to recall mandate to be exercised only in extraordinary circumstances) *with Bennett*, 295 F.3d at 807 (describing a district court's authority to grant Rule 60(b) motions as one involving "broad discretion"); *Marquip, Inc.*, 198 F.3d at 1369 ("the district court's broad discretion to apply Rule 60(b)"); *Hoult*, 57 F.3d at 3 ("district courts enjoy broad discretion in deciding motions brought under Rule 60(b)"); *Lee*, 936 F.2d at 979 ("A trial judge has broad discretion to grant Rule 60(b) relief from judgment."). However, that difference shows there is even more need to restrict the use of Rule 60(b) in habeas cases, because the broader the discretion to upset final judgments, the greater the threat to the finality interests that drove the Supreme Court's decision in *Calderon*. Everything the Supreme Court said about why mandate recalls must be given a more restricted role in habeas cases than in other

cases applies in at least equal, and perhaps greater, measure to reopening judgments under Rule 60(b).

For all of these reasons, a Rule 60(b) motion at the trial level is the equivalent, for all present intents and purposes, of a motion to recall the mandate at the appellate level. *See Burris v. Parke*, 130 F.3d 782, 783 (7th Cir. 1999) ("Appellate courts agree that a post-judgment motion under Fed. R. Civ. P. 60(b) in the district court, or the equivalent motion in the court of appeals—which is to say, a motion to recall the mandate—is a 'second or successive' application for purposes of § 2244(b)."). That is why it is no surprise that the two often travel together. In *Calderon* one day the petitioner filed in the appellate court a motion to recall the mandate, and the next day he filed in the district court a Rule 60(b) motion containing the same grounds and allegations. Calderon, 523 U.S. at 546, 118 S. Ct. at 1496. In the *Mobley* case that we have before us now, the petitioner filed in this Court his motion to recall the mandate on the same day he applied to us for a certificate of appealability to appeal the district court's denial of his Rule 60(b) motion, and both of those attacks on the final judgment denying him habeas relief were based on the same ground and allegations. *Mobley*, 306 F.3d at 1099-1100.

To a petitioner it does not matter whether he gets the final judgment against him reopened through a mandate recall or through a Rule 60(b) motion. To the State it does not matter, because the injury to its interests is the same regardless of which procedural weapon is used to inflict the wound. To us it should not matter which procedure is used, either; in habeas cases both should be governed by the same principles and be subject to the same restrictions.

We conclude that those principles which were discussed, and those restrictions which were set out, by the Supreme Court in *Calderon* apply to attempts to reopen final judgments under Rule 60(b). That means in a § 2254 case a peti-

tioner's Rule 60(b) motion to reopen the judgment "can be regarded as a second or successive application for purposes of § 2244(b)," and should be so regarded because "[o]therwise, petitioners could evade the bar against relitigation of claims presented in a prior application, or the bar against litigation of claims not presented in a prior application." *Calderon*, 523 U.S. at 553, 118 S. Ct. at 1500 (citations omitted). Because a petitioner's attempt to reopen a final habeas judgment pursuant to Rule 60(b) is to be treated as an application to file a second or successive petition, it ordinarily should be dismissed by the district court pursuant to § 2244(b)(4).[10]

Of course, if the grounds of relief stated in the Rule 60(b) motion satisfy the stringent requirements of § 2244(b)(1) & (2), the petitioner should put those grounds in a habeas petition and move under § 2244(b)(3)(A) for an order from the court of appeals authorizing the district court to consider it. The point of the rule we announce today is that the peti-

[10] In *Castro v. United States*, _U.S._, 124 S. Ct. 786 (2003), the Supreme Court held that when faced with a motion by a *pro se* federal prisoner that is not labeled as a § 2255 motion, a district court cannot without more recharacterize the motion as one under § 2255. The court must inform the prisoner that the recharacterization being contemplated will subject his subsequent filings to the restrictions on second or successive filings, and it must provide him with an opportunity to amend or withdraw the initial filing. If the court does not do that, the recharacterized filing cannot be counted as a § 2255 motion for purposes of applying the restrictions against second or successive motions. *Id.* At_, 124 S. Ct. at 792.

That is not what we have here. None of the prisoners before us had his initial filing recharacterized by the district court. All their initial pleadings were filed under § 2254 or § 2255, were labeled as such by the prisoner, and were treated by the court accordingly. The *Castro* decision does not extend beyond initial filings, and nothing the Supreme Court said or did in that case implies that the § 2244(b) restrictions can be evaded by the simple expedient of labeling second or successive filings to be something they are not.

tioner may not get around the statutory restrictions on second or successive petitions by filing a Rule 60(b) motion, unless the grounds of the motion fit within one of the two exceptions we are about to discuss.[11]

E.

Because the *Calderon* reasoning does apply to Rule 60 motions as well as mandate recalls in habeas cases, the two extra-statutory exceptions discussed in that decision also apply. This means that there are two different circumstances or exceptions in which a petitioner will be permitted to file a Rule 60 motion and have it treated by the district court as a motion under that rule instead of as a non-authorized (by the appellate court pursuant to § 2244(b)(3)(A)) application to file a second or successive petition.

One circumstance is where the final judgment is recalled or reopened to correct clerical errors in the judgment itself. As the Supreme Court explained, "[t]he State can have little interest, based on reliance or other grounds, in preserving a mandate not in accordance with the actual decision rendered by the court." *Id.* at 557, 118 S. Ct. at 1501. The same is true, of course, when a judgment is reopened under Rule 60(a) to correct a mere clerical mistake. So, there is that exception.

[11] Nor may a petitioner circumvent the restrictions on second or successive petitions by the simple expedient of filing an independent action aimed at the judgment denying habeas relief. *See generally* Fed. R. Civ. P. 60(b) (3d sentence). All of the reasoning and all of the principles we have been discussing apply fully to any independent action designed to set aside or reopen a judgment denying federal habeas relief. Accordingly, such independent actions are subject to the § 2253(c) requirement that a certificate of appealability be obtained before the denial of one may be appealed, and relief from a judgment denying a habeas petition may not be granted in an independent action except in the two circumstances we are about to discuss in which relief may be granted on a Rule 60(b) motion.

The other circumstance in which a petitioner will be able to file a Rule 60 motion and have it treated by the district court as a motion under that rule instead of as a non-authorized second or successive petition is where there was fraud upon the federal court which led to the denial of the habeas petition. In its *Calderon* opinion, the Supreme Court said: "This also is not a case of fraud upon the court, calling into question the very legitimacy of the judgment. *See Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 64 S. Ct. 997 (1944)." *Calderon*, 523 U.S. at 557, 118 S. Ct. at 1501-02. It is unclear whether with those words (contained in a paragraph which begins "We should be clear about the circumstances we address in this case . . . .") the Court meant to recognize a fraud exception or simply to reserve for later the question of whether that exception exists. Since we have before us one petitioner who contends that he is entitled to the benefit of a fraud exception, we cannot put off until another day the decision of whether one exists. We think it does.

A State's interest in the finality of a judgment denying federal habeas corpus relief is not compelling if that judgment would not have been obtained but for fraud that its agents perpetrated upon the federal court. Rule 60(b)(3) permits a judgment to be reopened for fraud, and the savings clause of the rule specifies that it does not "limit the power of a court . . . to set aside a judgment for fraud upon the court." To that extent, Rule 60(b) has a field of operation in habeas cases. The exact parameters of the fraud exception may have to be worked out on a case-by-case basis, but the Supreme Court's citation to the *Hazel-Atlas* decision in its *Calderon* opinion, 523 U.S. at 557, 118 S. Ct. at 1501-02, is instructive. (The *Hazel-Atlas* decision is cited by the commentary to Rule 60(b) as an illustration of a situation involving a fraud perpetrated upon a court. *See* Fed. R. Civ. P. 60(b) advisory committee's note.)

In the *Hazel-Atlas*, case the Hartford Company had been unsuccessful in its efforts to obtain a patent for a particular way of pouring glass into molds, called the "gob feeding" method. Its application faced "apparently insurmountable Patent Office opposition." *Hazel-Atlas*, 322 U.S. at 240, 64 S. Ct. at 998. To overcome that opposition, a lawyer for the company, with his client's knowledge and assistance, drafted an article for publication in a trade journal that described the gob feeding method as "a remarkable advance in the art of fashioning glass by machine," and "one of the two 'revolutionary devices' with which workmen skilled in bottle-blowing had been confronted since they had organized." *Id.* at 240-41, 64 S. Ct. at 998-99. The fraud in the fraudulent scheme was passing off the overblown advocacy penned by Hartford's attorney as a fact-based testimonial independently written by a disinterested expert in the field. That was accomplished by having the head of a national union of glass blowers sign the article as its purported author even though he had nothing to do with writing it. *Id.*

The phony article was published, and it had the intended effect. After the article was pointed out to the Patent Office, it issued Hartford a patent for the process. Hartford then filed a patent infringement suit against Hazel-Atlas, which was using that method to produce glass. Hartford did not emphasize the bogus article to the district court, and that court ruled against it. *Id.* at 241, 64 S. Ct. at 999. In the court of appeals the attorneys for Hartford, one of whom had been involved in the spurious article scheme, directed the court's attention to the article, and as the Supreme Court put it, "[t]he reference was not without effect." *Id.* In reversing the district court and directing that judgment be entered in favor of Hartford, the court of appeals quoted copiously from the article to support its holdings that the district court had erred, that the patent was valid, and that there had been infringement. *Id.*

Despite Hartford's payment of hush money to the national union leader who had signed the phony article, the fraud was ultimately discovered years after the judgment that it had been used to procure had become final (finality of judgment being defined by the term rule, in those days). The court of appeals refused to set aside its judgment in favor of Hartford, but the Supreme Court reversed. After recounting "this sordid story," *Id.* at 243, 64 S. Ct. at 1000, the Court held that the term rule was no bar to correcting the effect of the fraud, that Hazel-Atlas' delay in uncovering the fraud was not a bar, and that the effectiveness of the fraudulent article for Hartford's case in the court of appeals could not be disputed. *Id.* at 244-47, 64 S. Ct. at 1000-02.

The Supreme Court explained in *Hazel-Atlas* that, "[t]his is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury," but instead was "a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals." *Id.* at 245-46, 64 S. Ct. at 1001. The court of appeals decision was reversed with directions for it to recall the original mandate it had issued years before, to issue a new mandate directing the district court to set aside the judgment in favor of Hartford, and to take any additional action that was necessary and appropriate. *Id.* at 251, 64 S. Ct. at 1004.

That case is the example the Supreme Court gave in *Calderon* of the kind of fraud which justifies upsetting the finality interests that arise when a State criminal judgment has been left standing after a full round of federal habeas review. *Calderon*, 523 U.S. at 557, 118 S. Ct. at 1501-02. With that and the other teachings of the *Calderon* decision in mind, we will turn to the particular circumstances of the two § 2254 cases before us, but before doing so we pause to consider the competing approach the dissent would have us adopt.

The dissent's functional inquiry, as we understand it, is adopted from the First Circuit's opinion in *Rodwell v. Pepe*, 324 F.3d 66, 70 (1st Cir. 2003), which ignores the Supreme Court's, *Calderon* decision. Although the critically important *Calderon* decision had been on the books for five years before the First Circuit released its *Rodwell* opinion, that opinion does not even mention the Supreme Court decision. Uninformed by *Calderon*, the First Circuit's approach requires a court to determine in every case where a Rule 60(b) is filed seeking to set aside a habeas judgment whether the motion's factual predicate "deals primarily with the constitutionality of the underlying state [or federal] conviction or sentence," or "deals primarily with an irregularity or defect in the procurement of the judgment denying habeas relief." Dissenting Op. at 103 (quoting *Rodwell*, 324 F.3d at 70) (alterations added by dissent). What exactly "deals primarily" means as it applies to the myriad of factual predicates arising in these type of cases would, of course, be subject to continuous debate and litigation. As a result, the states would be denied the "real finality" or "actual finality" of judgment the Supreme Court says they are entitled to have. *Calderon*, 523 U.S. at 556-57, 118 S. Ct. at 1501-02.[12]

---

[12] The fuzziness of the test the dissent would have us adopt is illustrated by the inconsistent way the dissent apparently would apply it in two materially identical circumstances. The dissent discusses our pre-AEDPA decision of *Lindsey v. Thigpen*, 875 F.2d 1509, 1512 (11th Cir. 1989), without concluding that decision was wrong to apply the certificate requirement to an appeal by a petitioner who had unsuccessfully sought Rule 60(b)(6) relief from the district court on two grounds. One of those grounds was that the controlling law applicable to a claim he had raised in his initial petition, which was denied, had been changed in a decisive way by an intervening Supreme Court decision. *See* Dissenting Op. at 112. That attempt by Lindsey to get a judgment denying habeas relief set aside because of a change in the law is seen by the dissent as one of those "misuses of Rule 60(b)." *Id.* at 113. Yet, when it comes to Gonzalez's attempt to use the same rule to get a judgment denying habeas relief set aside because of a change in controlling law, the dissent tells us that "Rule

Nodding slightly to that inevitable consequence, the dissent drops a footnote to assure us that it would emphasize to district courts that when applying Rule 60(b)(6)—only one of the six subdivisions of the broadly worded rule—they are to exercise "special caution" in order to avoid eviscerating the provisions of § 2244. *See* Dissenting Op. at 103 n.20. We are not assured.

Special caution is difficult to define and impossible to police in the fuzzy area of debating whether the factual predicate of a motion "deals primarily" with the constitutionality of the underlying judgment, or "deals primarily" with some irregularity or defect in the previous judgment denying relief from that earlier judgment. The same is true about "special caution" in determining how to exercise the broad discretion that district courts are given to decide whether to set aside judgments on such grounds as "mistake, inadvertence, surprise, or excusable neglect," Rule 60(b)(1), and because of "newly discovered evidence," Rule 60(b)(2), as well as for "any other reason justifying relief from the operation of the judgment," Rule 60(b)(6).

In sum, the Supreme Court had good reasons for recognizing in *Calderon* that the nature of habeas cases and the critical importance of the finality and comity interests they affect require special rules for motions to recall the mandate in them, and for insisting that lower courts abide by those rules. The same is true of the trial level analog of a motion to recall the mandate in a habeas appeal, which is the Rule 60(b) motion to re-open a judgment denying habeas relief. Besides, *Calderon* is a Supreme Court decision, so we must follow it

---

60(b) is the perfect vehicle for invoking the change-in-the-law exception to the mandate rule." *Id.* at 129. Rule 60(b), we are assured, is "tailor made for this situation." *Id.* Use of the rule is seen as non-fitting and even abusive in a situation involving a change in the controlling law in one case, while use of the same rule is seen as just perfect in another case involving a change in the controlling law.

regardless of whether we would have arrived at a different approach. The dissent's quarrel is really with the Supreme Court's Calderon decision.

V.

We now apply the lessons we have derived from *Calderon*, along with the two exceptions that decision recognized, to the two habeas cases remaining before us.

A.

Gonzalez does not contend that there was any clerical error in the final judgment denying him federal habeas relief, or that fraud was used to obtain that judgment. His sole contention is that the judgment was wrong, because the subsequently released decision in *Artuz v. Bennett*, 531 U.S. 4, 121 S. Ct. 361 (2000), shows that the "properly filed" language of § 2244(d)(2) was misinterpreted to deny him relief. He is attacking the merits of that decision—the term "merits" referring to the correctness of the decision itself even though the ground of this particular decision was the statute of limitations, an affirmative defense.

Gonzalez's Rule 60(b) motion is an attempt to relitigate a claim that has already been presented in a prior application and rejected, which means it must be dismissed under § 2244 (b)(1). As the Supreme Court explained in *Calderon*, "[o]therwise, petitioners could evade the bar against relitigation of claims presented in a prior application." Calderon, 523 U.S. at 553, 118 S. Ct. at 1500. An error of law, even one demonstrated by an intervening decision, does not fit either of the extra-statutory exceptions to the rule we have borrowed from *Calderon* and announced today. If it were otherwise, a habeas petitioner could use Rule 60(b)(6) to re-open a judgment denying habeas relief based upon a new decision implicating the correctness of the denial of relief in his case, even if that decision came ten, twenty, or thirty years after the judgment had been rendered, and even if it had not been made

retroactively applicable to his case.[13] There would be no finality. Because in Gonzalez's case there is no clerical error and there is no allegation of fraud affecting the prior habeas proceeding, the district court properly denied his Rule 60(b) motion.

B.

Mobley contends that the fraud exception applies to permit his Rule 60(b) motion to be decided under that rule without being subject to the § 2244(b) bar on second and successive petitions. However, his effort to establish that the claim

[13] The only circumstance in which Congress permitted a final habeas judgment to be reopened because of a new decision is where the petitioner asserts for the first time a claim that "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." § 2244(b)(2)(A). Gonzalez's claim fails to meet the requirements of that exception to the bar against second or successive claims.

This case sharply illustrates the difference between how our approach treats the restrictions contained in § 2244(b)(2) and how the dissent would treat them. Under our approach § 2244(b)(2)(A) still serves an important function. It serves to limit the circumstances in which a judgment denying habeas relief can be re-opened based upon a new decision. If the stringent requirements of that carefully drafted statutory provision are met, a new decision can be used to re-open the judgment, but not otherwise.

By contrast, under the dissent's position, § 2244 (b)(2)(A) would serve no purpose whatsoever. Why would a prisoner seeking to benefit from a new decision ever seek to obtain permission to file a second or successive petition by meeting the stringent requirements of that statutory provision when he would have a much easier time of it filing a Rule 60(b)(6) motion? Under the dissent's position, relief is available under that rule even if the new decision (as in this case) is not one of constitutional law, and even if the Supreme Court has not made that decision retroactively applicable to cases on collateral review. The dissent says that "Rule 60(b) is the perfect vehicle for invoking the intervening-change-in-the-law exception." Dissenting Op. at 129. It is, only if one thinks that a statutory provision specially targeting and narrowing the circumstances in which that exception should be invoked should be rendered perfectly meaningless.

contained in his motion fits within the fraud exception falls short. The claim is that Andrew Fuller, who testified at the sentence stage as the former prosecutor in the case, gave false testimony about the position of the victim's family regarding the sentence Mobley should receive for the murder. We begin by putting that testimony in context.

At the sentence stage of the trial (actually the retrial), Mobley put in evidence through the testimony of one of his attorneys that Mobley had offered to plead guilty to any crime with any sentence, so long as the sentence was not death. How that evidence is mitigating is not clear, but the theory may have been that the offer reflected well on Mobley because it demonstrated a willingness to accept some punishment for the cold-blooded murder he had committed.[14] If that was the theory it is a stretch, because Mobley's plea efforts simply show a desire to save his own skin, a willingness to deal in order to avoid the full penalty for his crime.

To Mobley's evidence that he had offered to plead guilty, the State responded with the testimony of former prosecutor Fuller, who explained to the jury why he had rejected Mobley's plea offer. The Georgia Supreme Court had stopped indicated earlier in the interlocutory appeal in the case that if Mobley's plea offer came into evidence, the reasons that Fuller rejected the offer could come in as well. *See Mobley v. State*, 262 Ga. at 810-11, 426 S.E.2d at 152-53. Fuller's testimony was not for the purpose of establishing an aggravating circumstance, but instead was for the purpose of weakening whatever small mitigating effect otherwise might arise from evidence of Mobley's attempt to escape a death

[14] The defense's mitigation theory was not that Mobley's offer to plead showed any kind of remorse. We know that, because the defense was adamant throughout the sentence hearing that Mobley was a sociopath who could not feel remorse, and for that reason he should not be faulted for acting in a remorseless way during and after the murder.

sentence by plea bargaining. The factual issue being explored was not whether the family of the victim, John Collins, supported a death sentence for his murder, but why the district attorney at that time had decided to seek one.

The transcript of the sentence stage shows Fuller did not testify that the victim's family was firm in wanting a death sentence, and he never told the jury that the family's feelings were a material consideration in his decision to seek death. Instead, he testified that "without question" the decision about the punishment to seek in a capital case "falls on the shoulders of the district attorney," and while district attorney he had made that decision. Although Fuller generally listened to the victim's family's views about the penalty, their views were, in his words, only "a small percentage factor on the scale of things." He explained that: "I want them to appreciate the fact that I make the decision. And families generally — and this family did not want to make the decision, they don't want to come to a meeting after what they've been through . . . they don't want to make the decision, and it's not their decision to make, anyway." He added: "But, yeah, I listened to them and I want to give every opportunity to everybody to have their input in a case because it is – it's a big decision."

When asked point blank how big a factor the family's position was in his decision to seek a death sentence, Fuller answered that: "90, 95 percent of the decision" was "based on the evidence I see that describes and defines the defendant for me." He testified he had concluded that the facts called for a sentence of death in the case, and although the family supported his decision to seek it they had never pressured him, and they had actually told him, "[i]t is your decision, we put our trust in you." During cross-examination, Mobley's counsel asked: "The Collins family, you alluded to this, they have never pushed you one way or the other in this case, is that correct?" Fuller answered: "That is correct." He was

asked: "They have always deferred to your judgment at the time as to what should be done, correct?," to which he answered: "Yes."

In his testimony at the sentence stage, Fuller did not simply deny that the views of the family were a significant factor in his decision to seek a death sentence, he elaborated on the more important factors that had led him to his decision. The case against Mobley for the robbery and murder of John Collins was a strong one. The evidence included a confession and the recovery of the pistol used in the killing, which Mobley had thrown out after the crime. The murder was a merciless, cold-blooded, execution-style killing stemming from a well-planned robbery of a Domino's Pizza franchise. Mobley marched Collins to the back where he forced him to get down on his knees, and while Collins was begging for his life Mobley shot him in the back of the head at close range. From those facts alone, in Fuller's words, "it became glaringly apparent that this was a capital case and I would proceed [with it] as a capital case." But there was more, a lot more, that cemented Fuller's decision to insist on a death sentence.

Before the trial Fuller learned that Mobley had spoken to another inmate in a disparaging way about how Collins, while kneeling, had begged for his life. Then Fuller learned Mobley had said that he wanted to get out of jail, because "he knew where he could get a job real quick, when he got out of jail, at Domino's Pizza because he knew there was a vacancy." As if that were not enough, Fuller found out that Mobley had gotten himself a jailhouse tattoo of the Domino's Pizza symbol. Fuller's reaction: "I mean, I could not believe it, I could not believe it."

Still, there was more. Mobley got into a confrontation with a deputy about aspirin or some similar medication, and as Fuller related it to the jury: "Mr. Mobley told the deputy that he was looking more and more like a Domino's Pizza

delivery boy." Fuller's reaction: "Again, I would have to say I couldn't believe it, you know." Finally, Fuller learned that Mobley, while he was awaiting trial, had participated in the rape of another inmate.

In all of those statements and actions of Mobley, Fuller saw: "[P]ure unadulterated meanness. It was nothing but pure unadulterated meanness in my viewpoint." Fuller was determined to seek the death penalty "for the protection of the people of the State of Georgia." When asked whether there was ever a point from the beginning of the case throughout the prosecution when he ever gave serious consideration or came close to not seeking the death penalty and to accepting the plea offer, Fuller answered: "Never." When asked if he had ever questioned the decision he had made to seek the death penalty, Fuller answered: "Never."

The closing arguments at the sentence stage of Mobley's trial show that no one interpreted Fuller's testimony to mean that the victim's family had been strong for a death sentence or that their feelings had affected Fuller's decision to seek one. The position of the victim's family about the proper penalty in the case was never even alluded to by the prosecution during its lengthy closing argument. It was, however, brought up by the defense. During his closing argument defense counsel reminded the jury that Fuller had testified that the family had not demanded the death penalty but instead had left up to Fuller the decision about the penalty to seek. Defense counsel argued that was a reason the jury should not impose a death sentence.

Those are the facts. Here are Mobley's allegations – and we stress that so far they are only allegations, not supported by so much as a proffered affidavit. In his Rule 60(b) motion, Mobley alleges that Fuller had told the victim's family that life without parole was not a sentencing option, and after using that misrepresentation to secure their support for a death sentence Fuller testified before the sentencing jury that

the family did support his decision to seek death, knowing all along that the family would not have supported it if they had known life without parole was an option.

To the extent Mobley's claim is that Fuller violated his constitutional rights by defrauding the family into giving him its support for a death sentence, the claim is without any legal basis. A defendant has no constitutional right to have the prosecutor explain the law accurately to the victim's family, and even if such a far-fetched constitutional right were created it would not be available to a petitioner for whom there is already a final judgment denying federal habeas relief.

To the extent Mobley's claim is that Fuller's testimony at the sentencing stage about the family's support defrauded the jury into returning a death sentence, the claim is not about fraud on the federal courts. As Judge Tjoflat explained when the case was before the panel, the fraud Mobley alleges was not committed when the case was before the federal habeas court but earlier when it was before the state courts. *Mobley*, 306 F.3d at 1106 (Tjoflat, J., dissenting) ("Read in the best possible light, Mobley's allegations imply that the State may have committed a fraud *upon the Georgia superior court* by proffering Fuller's allegedly false testimony during Mobley's sentencing.").[15] Fuller did not testify in the federal habeas proceeding, and the claim Mobley wants to present at this late date was not presented during that proceeding.[16] The fraud exception to our rule that 60(b) relief will not be granted to

---

[15] We agree with those statements from Judge Tjoflat's dissenting opinion in *Mobley* that we quote in this opinion, but beyond that we do not adopt his opinion in that case or its approach.

[16] Mobley did raise in his federal habeas petition a claim that Fuller had lied during his state trial testimony but that was a different claim about a different part of Fuller's testimony, and that claim was held to be procedurally barred anyway, without any decision about its merits. *Mobley v. Head*, 306 F.3d at 1106 n.10 (Tjoflat, J., dissenting).

reopen final judgments denying federal habeas relief applies where the fraud was perpetrated on the federal court and resulted in the denial of federal habeas relief, not where the fraud was perpetrated on a state court. To the extent Mobley is asserting that the alleged fraud on the state court violated some federal constitutional right of his, he is simply putting forward a new federal constitutional claim that was not presented in his earlier habeas petition. It is a classic successive petition claim subject to the § 2244(b)(2) restrictions, which this claim does not meet. It is not a claim based upon a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court, § 2244 (b)(2)(A). Nor is it a claim based upon newly discovered evidence which, when the evidence is considered as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense, § 2244(b)(2)(B).

We do not mean to imply that the only defect in Mobley's fraud theory involves the court on which the alleged fraud was perpetrated. There can be no fraud unless the falsehood is matenal, and here the alleged falsehood is immaterial. After all, we are talking about one minor aspect of a former prosecutor's explanation about why he had rejected a conditional guilty plea offer of the defendant. And the support of the victim's family for a death sentence, even if it was obtained by the prosecutor's misrepresentation, counted for little in the prosecutor's decision making process, a process that he explained in great detail to the jury.

The mitigating weight of a defendant's attempt to avoid a death sentence by offering to plead guilty is so slight, if it exists at all, that even undiminished the effect would hardly register. And the only mention during closing arguments of the allegedly false part of the former prosecutor's testimony was by defense counsel who cited that testimony as a reason

for the jury not to impose a death sentence. It is no wonder that the state trial court, when considering this fraud claim, concluded that any misrepresentations or false testimony by Fuller along these lines was immaterial to the death sentence the jury returned in this case. *See Mobley*, 306 F.3d at 1099.[17]

For all of these reasons, Mobley's case does not come within shouting distance of the fraud exception outlined in the *Hazel-Atlas* decision, where there was "a deliberately planned and carefully executed scheme" participated in by attorneys in a federal proceeding to defraud a federal court, 322 U.S. at 245-46, 64 S. Ct. at 1001, with carefully constructed bogus evidence which not only was presented to that federal court but which also affected the federal court's decision. *Id.* at 241, 244-47, 64 S. Ct at 997, 1000-02. Mobley is not entitled to have the judgment denying him federal habeas relief re-opened on this or any other basis.[18] The district court did not abuse its discretion in denying his Rule 60(b) motion.

VI.

In conclusion, a Rule 60(b) motion seeking to reopen the judgment in a § 2254 or § 2255 case should be denied by the district court, unless it is filed to correct a clerical mistake (meaning it is really a Rule 60(a) motion) or is filed pursuant to Rule 60(b)(3) to remedy a fraud agents of the government perpetrated on the federal court. No appeal from the denial of a Rule 60(b) motion seeking to reopen a judgment denying

---

[17] We probably should add that the jury was presented with evidence that Mobley had committed six other robberies in the three weeks between his murder of Collins and his arrest for it.

[18] The State of Georgia contends that even if there had been fraud it is not responsible because Fuller was no longer a prosecutor at the time he testified; he was then a state court judge. We need not decide how the fact that Fuller was not an attorney for the state in the proceeding impacts the analysis, because it does not matter. Even if he had been the district attorney at the time of his testimony in the sentence proceeding, that would not change our conclusion.

§ 2254 or § 2255 relief may proceed unless a § 2253 certificate of appealability is issued.

Mobley's application for a certificate of appealability is GRANTED, but the district court's denial of his Rule 60(b) motion is AFFIRMED. His motion to recall the mandate is DENIED, and the stay of execution entered on his behalf by the panel is VACATED. Any other applications or motions Mobley has filed are DENIED.[19]

Lazo's application for a certificate of appealability is DENIED.

Gonzalez's application for a certificate of appealability is GRANTED, but the district court's denial of his Rule 60(b) motion is AFFIRMED.

EDMONDSON, Chief Judge, specially concurring in part and dissenting in part:

In these appeals, we are called upon to clarify the interaction of two laws which Congress has approved: Fed. R. Civ. P. 60 and AEDPA. As I understand our duty in such instances, we must give each all the force that we can. *See, e.g., Reg'l Rail Reorganization Act Cases*, 95 S.Ct. 335, 354 (1974) ("A new statute will not be read as wholly or *even partially amending* a prior one unless there exists a positive repugnancy between the provisions of the new and those of the old that cannot be reconciled.") (emphasis added). I agree, however, that AEDPA would trump Rule 60 when, and to the degree, an irreconcilable conflict arises. I believe that Judge Tjoflat has the better understanding of how these laws interact: his view seems more correct to me because it leaves Rule 60 more intact as well as crediting AEDPA.

---

[19] There is some confusion about whether Mobley filed, or merely lodged with this Court without subsequently filing, an application for a certificate to permit him to file a successive habeas petition. If he did file that application, it is denied, because it fails to fit within the requirements of § 2244(b).

The Supreme Court's decision in *Calderon*, I think, does not control the present cases. In *Calderon*, the Court did not deal with Rule 60 and was not governed by AEDPA; so, the Supreme Court did not grapple (as we do now) with the duty to give the fullest possible credit to two different laws, each of which Congress had approved. I cannot agree that extending *Caldero*--an inherent judicial-powers case in which the Supreme Court acted not only as interpreter of laws, but also as supervisor of lower courts--is either necessary or proper for the present appeals.

I suppose that the sharp-edged formulation today's Court makes of Rule 60 will be easier for courts to apply. It might be easier because this approach seems to require less deliberate study of the pertinent motion--study to determine accurately not just the name of the pertinent motion, but the function of the motion (is it in reality a claim of illegal detention: a habeas petition?)--than would be required by the law as Judge Tjoflat understands it. For this reason and others, I personally like the ingenious formulation today's Court makes of Rule 60 in habeas cases.

If I were the policy-maker for the nation, I might embrace today's Court's formulation. (Perhaps Congress will too.) But, of course, federal judges are not the rightful makers of policy in this sphere. And we cannot properly favor what is convenient over what is true. And what, to me, is truly required jurisprudentially in a case like this one is the approach that gives both of the laws Congress has approved their fullest possible force. Moreover, I am confident that judges have the ability to apply the law as Judge Tjoflat has found it: it is hornbook law that courts are to determine the legal effect of motions by the motions' substance rather than by their titles.

I know of the frustrations caused by the lack of finality in litigation. I personally am keen for more finality in the criminal justice process. But today, the finality that we as judges can rightly impose on the criminal process is no more

finality than Rule 60 and AEDPA will allow when these laws are each faithfully given the fullest possible force. In the light of this principle, I join in the results Judge Tjoflat would reach in these appeals.

I.

TJOFLAT, Circuit Judge, specially concurring in part and dissenting in part.[1]

Federal Rule of Civil Procedure 60(b) authorizes the district courts to relieve a party to a civil action from the force of a final judgment on the following grounds:

> mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence [the party] could not have . . . discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released; or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Additionally, under what has been labeled Rule 60(b)'s "savings clause,"[2] the district courts retain the power "to enter-

---

[1] I join the majority in affirming the district court's judgment in *Mobley*. I specially concur in the majority's judgment in *Lazo*. The majority refuses to grant Lazo a certificate of appealability and therefore effectively affirms the district court's judgment denying his Rule 60(b) motion. Because the district court lacked subject matter jurisdiction to entertain the motion—which was a second or successive motion under 28 U.S.C. § 2255 disguised as a motion under Rule 60(b)—I would affirm its judgment. I dissent, however, from the majority's decision to affirm in *Gonzalez*. In that case, the district court held that it lacked jurisdiction to consider the petitioner's Rule 60(b) motion, and the majority affirms. I believe the district court had jurisdiction. Therefore, I would vacate the district court's ruling and remand the case with the instruction that the district court consider the motion on its merits.

[2] *Travelers Indem. Co. v. Gore*, 761 F.2d 1549, 1551 (11th Cir. 1985); Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2868, at 396 (1995).

tain an independent action to relieve a party from a judgment, order, or proceeding . . . or to set aside a judgment for fraud upon the court."

Today, the majority today holds that, with the exception of the ground provided by Rule 60(b)(3),[3] the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, precludes the district courts of the Eleventh Circuit from entertaining Rule 60(b) motions filed by prisoners who seek the vacation of the district court's judg-ment denying them habeas corpus relief.[4] To obtain relief on any of the remaining grounds provided by the Rule (i.e., Rule 60(b)(1), (2), and (4)-(6)), the petitioner must apply to this court pursuant to 28 U.S.C. § 2244(b)(3) for leave to file his Rule 60(b) motions.[5] The majority treats any motion

[3] The majority also recognizes a second exception. The district courts retain the authority under Fed. R. Civ. P. 60(a) to correct "a mere clerical mistake" in a final judgment. Maj. op. at 56. None of the three appeals before us implicates this rule; hence, I make no further mention of it.

[4] The majority's decision restricts the ability of prisoners to file Rule 60(b) motions and independent actions preserved by the Rule's savings clause. Maj. op. at 55 n.11. Before today, such actions were available to habeas petitioners. *See, e.g., Buell v. Anderson*, 48 Fed. Appx. 491, 498 (6th Cir. 2002) ("An independent action for relief is an equitable remedy available in civil trials, including habeas proceedings which are conducted under civil rules of procedure."); *Hess v. Cockrell*, 281 F.3d 212, 217 (5th Cir. 2000) (denying the habeas petitioner's independent action for relief from adverse judgment because the petitioner failed to establish "[t]he elements of an independent action" as prescribed in *Bankers Mortgage Co. v. United States*, 423 F.2d 73, 79 (5th Cir. 1970)). Unless I note otherwise, this opinion applies equally to both Rule 60(b) motions and independent actions preserved by the Rule.

[5] Both state and federal prisoners must obtain leave of the appropriate court of appeals before filing second or successive collateral attacks upon their convictions or sentences. A court of appeals may only grant such leave to state prisoners who satisfy the criteria of 28 U.S.C. § 2244(b) or federal prisoners who satisfy the criteria of § 2255. Section 2244(b) provides:

based on one or more of those grounds as a second or successive habeas Petition ("SSHP")[6] even if the motion contains no

> (b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> (b)(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Section 2255 provides:

> A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—
>
> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

Throughout this opinion, I analyze the effects of the majority's holdings on litigation involving Rule 60(b). Although I often write in terms of how § 2244's restrictions on successive petitions (filed by state prisoners under § 2254) will impact such litigation, this discussion generally extends equally to § 2255's comparable restrictions on successive motions (filed by federal prisoners under that section). While §§ 2244 and 2255 are not textually identical, their differences are of no consequence in my analysis unless I note otherwise.

[6] Here and throughout this opinion, the phrase "second or successive habeas petitions" and the abbreviation "SSHP" refer also to second or successive motions under § 2255.

constitutional claim at all. The majority also holds that before the petitioner can appeal the denial of a Rule 60(b)(3) motion, either the district court or this court must issue a certificate of appealability ("COA") pursuant to 28 U.S.C. § 2253.

I respectfully dissent from these two holdings because the rationale supporting them is fundamentally flawed. Aside from this, I am convinced that the implementation of the majority's holdings will unnecessarily add to the workload of this court.

This opinion is organized as follows. Part II addresses the majority's first holding, which treats all Rule 60(b) motions —with the exception of those filed under Rule 60(b)(3)—as SSHPs. Part III addresses the majority's second holding, which requires the issuance of a COA before a petitioner can appeal the district court's denial of a Rule 60(b)(3) motion. Part IV describes the practical implications of the majority's holdings. Part V suggests the dispositions we should make in the three consolidated appeals before us.

II.

By treating all Rule 60(b) motions—except those filed under Rule 60(b)(3)—as SSHPs, the majority misunderstands the history and purpose of Rule 60(b), fails to appreciate the functional difference between an SSHP and a Rule 60(b) motion, and misapplies the Supreme Court's decision in *Calderon v. Thompson*, 523 U.S. 538, 118 S. Ct. 1489, 140 L. Ed. 2d 728 (1998). I address these points in turn and then suggest the course we should follow.

A.

At common law, "the term of court was decisive in determining whether or not the district court had power over its final judgments and decrees." Note, *History and Interpretation of Federal Rule 60(b) of the Federal Rules of Civil Procedure*, 25 Temple L.Q. 77, 78 (1951) [hereinafter "Note, *History*."]. During the term, a court "had full power to vacate or revise [its] judgments." Commentary, *Effect of Rule 60b on Other Methods of Relief from Judgment*, 4 Fed. Rules Serv. 942, 942 (1941). After the term, a party could obtain relief from a judgment only through four types of "remedial devices": (1) one of the ancient writs, i.e., "audita querela, coram nobis, coram vobis, bill[s] of review, and bill[s] in the nature of bills of review"; (2) an "[i]ndependent action[ ] for relief, based on extrinsic fraud, mistake, and accident"; (3) the "[i]nherent power of the court to modify judgments"; and (4) the "[p]ower [of the court] to disregard void judgments." Note, *Federal Rule 60(b): Relief from Civil Judgments*, 61 Yale L.J. 76, 76 n.3 (1952).

Each of the ancient writs permitted relief in different scenarios. Audita querela, a common law writ, typically "afford-[ed] relief to a judgment debtor against a judgment or execution because of some defense or discharge arising subsequent to the rendition of the judgment or the issue of the execution." 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2867, at 394 (Civil 2d ed. 1995). Coram nobis and coram vobis, both equitable in nature, sought to remedy "mistakes of fact, not appearing on the face of the record, and but for which the judgment would not have been entered." Commentary, *supra*, at 942-43. If the judgment under attack issued from the King's Bench, the former writ was appropriate; if it issued from any other court, the latter was used. *Black's Law Dictionary* 338 (7th ed. 1999). A bill of review in equity would lie upon any of four grounds: (1) "error of law apparent upon the record," (2) newly discovered evidence," (3) "the occurrence of new matter or new facts after the entry of the decree which make its enforcement inequitable," or (4) "fraud in procuring the decree." James Wm. Moore & Elizabeth B. A. Rogers, *Federal Relief from Civil Judgments*, 55 Yale L.J. 623, 677-79 (1946).

Despite their formal distinctions, however, the ancient writs as a practical matter had confusing and "uncertain boundaries." *Klapprott v. United States*, 335 U.S. 601, 614, 69 S. Ct. 384, 390, 93 L. Ed. 266 (1949). For example, while the usual rule was that audita querela lay only for matters arising subsequent to judgment, many courts granted relief under this writ for matters arising before judgment, thereby blurring the distinction between audita querela and coram nobis (or vobis). 12 James Wm. Moore et al., *Moore's Federal Practice* § 60 App. 105, at 60 App.-29 (3d ed. 2003). The Supreme Court in *Klapprott* recognized that "few courts ever . . . agreed as to what circumstances would justify relief under these old remedies." 335 U.S. at 614, 69 S. Ct. at 390.

The enactment of the Federal Rules of Civil Procedure in 1938 was, in part, an attempt to eliminate the confusion caused by the inconsistent application of these ancient writs. In its original form, Rule 60(b) stated:

> On motion the court, upon such terms as are just, may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding, or (2) to set aside within one year, as provided in Section 57 or the Judicial Code, U.S.C., Title 28, § 118, a judgment obtained against a defendant not actually personally notified.

Moore, supra, § 60 App. 10[1], at 60 App.-2. On its face, Rule 60(b) seemed progressive; parties could seek relief from judgments without resort to the ancient writs and without regard to the term of court, subject to the six-month limitations period. But many courts stripped the Rule of its progressivity through traditional common law devices. Some courts, for example, granted motions for relief filed more than six months after final judgment, often based upon their "'inherent power' to control judgments where the 'term' had not expired." Note, *History*, *supra*, at 78. Other courts "read into [Rule 60(b)] the nebulous writs that had traditionally provided post-term relief." *Id.*

This problem did not go unnoticed. In 1946, Rule 60(b) was substantially amended to read as it does today.[7] In addition to providing six grounds for relief, *see supra* Part I,

> th[e] rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Fed. R. Civ. P. 60(b).

The drafters of modern Rule 60(b) were unconcerned with "the substantive law as to the grounds for vacating judgments." Fed. R. Civ. P. 60 advisory committee's note (1946). Rather, they sought to create a comprehensive procedural scheme, one that would "remove the uncertainties and historical limitations of ancient remedies while preserving all of the various kinds of relief that they afforded." 11 Wright, Miller & Kane, *supra*, § 2851, at 227. The Rule accomplished three tasks. First, it set different time limits for articulating different grounds of relief. Second, the Rule abolished the ancient writs, "shrouded [as they were] in ancient lore and mystery." Advisory committee's note, *supra*. Third, Rule 60(b) estab-

[7] The minor amendments made since 1946 are of no concern to us here.

lished four devices for parties to seek relief from civil judgments:

> 1. *Rule 60(b) motions*. A party may seek relief from a judgment upon any ground enumerated in the Rule.
>
> 2. *Independent Actions*. A party may initiate a new action to seek relief from a judgment. It may bring this action in any district court, not just the one that rendered the judgment from which relief is sought. 11 Wright, Miller & Kane, *supra*, § 2851, at 229.
>
> 3. *Statutory procedures*. A court may grant relief from a judgment without resort to Rule 60(b) as authorized by statute.[8]
>
> 4. *Inherent powers*. Rule 60(b) expressly permits a district court "to set aside a judgment for fraud upon the court."

The best explanation of the interrelationship of Rule 60(b) and the independent actions preserved by the Rule's savings clause is contained in the Fifth Circuit's opinion in *Bankers Mortgage Co. v. United States*, 423 F.2d 73, 78-79 (5th Cir. 1970);[9]

---

[8] There are at least three examples in this category. First, Rule 60(b) states that it does not "limit the power of a court to . . . grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. § 1655," which prescribes how courts should deal with absent defendants in lien enforcement proceedings. Second, the 1946 advisory committee's note recognizes that "under . . . the Soldiers', and Sailors' Civil Relief Act of 1940 . . . a judgment rendered in any action or proceeding governed by the [Act] may be vacated under certain specified circumstances upon proper application to the court." Third, "the declaratory-judgment statute [28 U.S.C. § 2202] authorizes the court to grant additional 'necessary or proper relief' based on any judgment entered under it, and a party can seek [such relief] without satisfying the requirements of Rule 60(b)." 11 Wright, Miller & Kane, *supra*, § 2869, at 408.

[9] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

> The second procedure contemplated by Rule 60(b) is an independent action to obtain relief from a judgment, order, or proceeding. The . . . saving clause specifically provides that 60(b) does not limit the power of the court to entertain such an action. It is important to emphasize 'independent action,' as used in this clause, was meant to refer to a procedure which has been historically know simply as an independent action in equity to obtain relief from a judgment. This action should under no circumstances be confused with ancillary common law and equitable remedies or their modern substitute, the 60(b) motion.
>
> When a court grants relief from a judgment or decree by a new trial or rehearing, or by one of the ancillary common law or equitable remedies or their modem substitute, a motion, it is exercising a supervisory power of that court over its judgment; but the original bill, or independent action, to impeach for fraud, accident, mistake or other equitable ground is founded upon an independent and substantive equitable jurisdiction.

If the litigant's "right to make a [Rule 60(b)] motion is lost by the expiration of the time limits fixed in these rules, the only procedural remedy is by a new or independent action to set aside a judgment upon those principles which have heretofore been applied in such an action." *Id.* at 81 n.13.

B.

In part because it failed to appreciate this history, the majority overlooks the important distinctions between the motions and independent actions Rule 60(b) authorizes and SSHPs. Like the ancient procedures it replaced, Rule 60(b) was never intended to permit parties to relitigate the merits of claims or defenses, or to raise new claims or defenses that could have been asserted during the litigation of the case. Rather, the aim of Rule 60(b) was to allow a district court to grant relief when its judgment rests upon a defective foundation.

As applied in the habeas context, the "factual predicate [of a Rule 60(b) motion] deals primarily with some irregularity or procedural defect in the procurement of the judgment denying habeas relief." *Rodwell v. Pepe*, 324 F.3d 66, 70 (1st Cir. 2003). The same is true with respect to an independent action brought under the Rule's savings clause. *See Buell v. Anderson*, 48 Fed. Appx. 491, 498 (6th Cir. 2002) (explaining the elements of an independent action, all of which concern the integrity of the habeas judgment); *Hess v. Cockrell*, 281 F.3d 212, 217 (5th Cir. 2002) (same). A true Rule 60(b) motion "seek[s] relief from a federal court's final order entered in a habeas proceeding on one or more of the grounds set forth in" the Rule. *Abdur'rahman v. Bell*, 537 U.S. 88, 94, 123 S. Ct. 594, 597, 154 L. Ed. 2d 501 (2003) (Stevens, J., dissenting). Neither proceeding constitutes a collateral attack on the underlying conviction or sentence.

An SSHP is a different species. Like a first petition for a writ of habeas corpus, an SSHP is a collateral attack upon the applicant's conviction or sentence. After AEDPA, an applicant may seek SSHP relief by asserting "(1) claims that 'rel[y] on a new rule of constitutional law,' and (2) claims that rely on a rule of constitutional law and are based on evidence that 'could not have been discovered previously through the exercise of due diligence' and would establish the petitioner's factual innocence." *Mobley v. Head*, 306 F.3d 1096, 1100-01 (11th Cir. 2002) (vacated panel opinion) (Tjoflat, J., dissenting) (quoting 28 U.S.C. § 2244(b)(2)). Thus, SSHPs are concerned entirely with "alleged violations of federal rights" that occurred during the proceedings resulting in the petitioner's conviction or sentence. *Rodriguez v. Mitchell*, 252 F.3d 191, 199 (2d Cir. 2001). As I noted in my dissent from the panel opinion in *Mobley*,

> [n]either of [the] types of claims [cognizable under section 2244(b)(2)] challenges the district court's previous denial of relief under 28 U.S.C. § 2254. Instead, each alleges that the contextual circumstances of the proceeding have changed so much that the petitioner's conviction or sentence now runs afoul of the Constitution.

Mobley, 306 F.3d at 1101 (Tjoflat, J., dissenting).

Thus, "the difference [between an SSHP and a Rule 60(b) motion] is defined by the relief that the applicant seeks." *Abdur'rahman*, 537 U.S. at 94, 123 S. Ct. at 597 (Stevens, J., dissenting). An SSHP,

> like all habeas corpus petitions, is meant to remedy constitutional violations (albeit ones which arise out of facts discovered or laws evolved after an initial habeas corpus proceeding), while a Rule 60(b) motion is designed to cure procedural violations in an earlier proceeding—here, a habeas corpus proceeding—that raise questions about that proceeding's integrity.

Mobley, 306 F.3d at 1101 (Tjoflat, J., dissenting). By granting an SSHP, the district court "invalidat[es]" the conviction or sentence. *Rodriguez*, 252 F.3d at 198. By granting a Rule 60(b) motion, the court "merely reinstate[s] the previously dismissed petition for habeas, opening the way for further proceedings seeking ultimately to vacate the conviction." *Id.*

C.

In defense of its holding that all Rule 60(b) motions—except motions seeking Rule 60(b)(3) relief—are SSHPs that cannot be filed in the district court without leave of this court obtained pursuant to § 2244(b)(3)(A), the majority relies upon the Supreme Court's decision in *Calderon*.

In that case, the petitioner moved the court of appeals to recall its mandate denying habeas relief. *Calderon*, 523 U.S. at 545-46, 118 S. Ct. at 1496.[10] The panel of the court that

[10] The next day, he moved the district court pursuant to Rule 60(b) to vacate its decision which granted in part and denied in part his application for a writ of habeas corpus. The filing of the Rule 60(b) motion had no

decided the petitioner's appeal denied his motion. The court thereafter convened en banc to hear oral argument on the question of "whether the panel decision . . . would result in a fundamental miscarriage of justice." *Id.* at 547, 118 S. Ct. at 1497. After hearing argument, the en banc court, acting *sua sponte*, recalled the court's mandate and affirmed the district court's decision. *Id.* at 548-49, 118 S.Ct. at 1497.

The Supreme Court reversed. Acknowledging that in some circumstances a court of appeals has "inherent power to recall [its] mandate[ ]," *id.* at 549, 118 S. Ct. at 1498, the Court concluded that the en banc court's exercise of such power in this case constituted an abuse of discretion, *id.* at 566, 118 S. Ct. 1506. As for the State's argument that AEDPA barred the court from recalling the mandate, the Court held that AEDPA had no application because the court recalled the mandate on its own initiative, not on the petitioner's motion. *Id.* at 554, 118 S. Ct. 1500. Nonetheless, the Court had this to say about AEDPA's application when a court of appeals is considering whether to grant a habeas petitioner's motion to recall its mandate:

> In a § 2254 case, a prisoner's motion to recall the mandate on the basis of the merits of the underlying decision can be regarded as a second or successive application for purposes of § 2244(b). Otherwise, petitioners could evade the bar against relitigation of claims presented in a prior application, § 2244(b)(1), or the bar against litigation of claims not presented in a prior application, § 2244(b)(2). If the court grants such a motion, its action is subject to AEDPA irrespective of whether the motion is based on old claims (in which case § 2244(b)(1) would apply) or new ones (in which case § 2244(b)(2) would apply).

Id. at 553, 118 S. Ct. at 1500.

---

bearing on the Supreme Court's eventual decision in *Calderon*, and it has no bearing on our decisions today.

I concur in the majority's view that once a court of appeals issues its mandate in a habeas case, a petitioner's *Calderon*-type motion to recall the mandate, which asks the court of appeals to entertain a new claim or revisit an old claim, constitutes an SSHP as defined by AEDPA.[11] I further observe that *Calderon*, in application, yields this result: the petitioner's motion to recall the mandate must be denied. If the motion merely asks the court to revisit its disposition of the claims the petitioner had (unsuccessfully) litigated, § 2244(b)(1) requires that the court deny the motion.[12] If the

---

[11] I assume here that the majority is only concerned with motions to reconsider an appellate decision after the mandate issues. Despite its treatment of motions to recall the mandate, the majority opinion does not explicitly interpret *Calderon* to treat timely petitions for rehearing as SSHPs. I believe this discrepancy might be explained by the fact that a habeas petitioner's petition for rehearing must be filed prior to the court's issuance of its mandate, while the court can still revisit its decision. *See* Fed. R. App. P. 41.

Furthermore, I read *Calderon* to apply only to motions to recall the mandate that ask the court of appeals to entertain new constitutional challenges to a petitioner's conviction or sentence or revisit old ones. I disagree with the majority insofar as it reads Calderon more broadly. If the motion to recall the mandate challenged the integrity, rather than correctness, of the appellate decision, that motion would, in my view, fall beyond *Calderon*'s scope. I must confess, however, that such a motion is difficult to imagine.

[12] In a case in which, after the court of appeals mandate issued, the Supreme Court handed down a new rule of constitutional law made retroactive to cases on collateral review that would have required the court of appeals to decide a claim in favor of, rather than against, the petitioner, query whether AEDPA, as interpreted in *Calderon*, would permit the court to grant the petitioner's motion to recall the mandate (on the basis of the new rule) or require the court to deny the motion under § 2244(b)(1). If AEDPA would bar the court from granting the petitioner's motion, the petitioner's avenues of relief would be to (1) move the district court pursuant to Rule 60(b)(6) to vacate its decision rejecting the claim, or (2) bring an independent action, as permitted by Rule 60(b)'s savings clause.

motion raises new claims, the court will deny it under the time-honored rule that a court of appeals will not consider claims not seasonably presented to the district court in the first instance.[13]

Calderon does not speak to the authority of the district court to grant a habeas petitioner relief under Rule 60(b). The majority believes that it does by analogy.[14] An analogy may appear at first blush, but, to me at least, it disappears when one compares recalling an appellate mandate with the collateral attacks provided by Rule 60(b) and the independent actions the Rule preserves under its savings clause.

By recalling its mandate, the court of appeals may reexamine its decision. *Calderon* permits the court to recall its mandate for such purpose *if* it does so on its own initiative. The fact that *Calderon* bars the court from recalling its mandate (in a habeas case) on the petitioner's motion does not alter the fact that, once the mandate is recalled, the court is in the same position it occupied before the mandate issued. When considering a motion to recall the mandate similar to that addressed in *Calderon*, the court of appeals is not entertaining a collateral attack that questions the integrity or legiti-

---

[13] In denying the motion, although the law would not require it to do so, the court could call the petitioner's attention to § 2244(b)(3)(A) and inform the petitioner that if he wishes to pursue his new claims, he must apply to this court for leave to file the claims in the district court.

[14] According to the majority,

> *Calderon's* lessons about whether and when an appellate court's power to recall a mandate may be used in habeas cases apply with as much force to the question of whether and when a trial court's Rule 60(b) authority to reopen a final judgment may be used in a habeas case. Recalling the mandate to reopen and alter the final judgment in a habeas case is the closest thing on the appellate level to the use of Rule 60(b) to reopen and change a final judgment at the trial level.

Maj. op. at 49-50.

macy of its judgment. *See supra* note 11. Instead, drawing on the same record it had before it when it rendered its decision, the court is simply reconsidering whether to adhere to its decision or come down another way.

The district courts lack the broad power the courts of appeals possess to recall their judgments. If it does not receive a motion filed pursuant to Rules 50(b), 52(b), 59 (a) or (e), or act *sua sponte* under Rule 59(d) of the Federal Rules of Civil Procedure no later than "10 days after the entry of judgment," a district court loses jurisdiction to revisit the claims and defenses the judgment resolved.[15] As explained in Part II.A, *supra*, Rule 60(b) and the independent actions its savings clause preserves give the court the power to set aside a judgment whose integrity is lacking. What Rule 60(b) and these independent actions *do not* provide is a means for litigants to obtain the district court's reconsideration of the claims and defenses its judgment adjudicated. *See Am. Bankers Ins. Co. v. Northwestern Nat'l Ins. Co.*, 198 F.3d 1332, 1338 (11th Cir. 1999) ("[T]he law is clear that Rule 60(b) may not be used to challenge mistakes of law which could have been raised on direct appeal[,]" the implication being that all that the Rule provides is a vehicle for attacking the integrity of the district court's judgment); *Travelers Indem. Co. v. Gore*, 761 F.2d 1549, 1552 (11th Cir. 1985) ("[T]he plaintiff cannot use an independent action as a vehicle for the relitigation of issues."); *Bankers Mortgage Co.*, 423 F.2d at 79 (5th Cir. 1970) ("The independent action can not be made a vehicle for the relitigation of issues."); *Donovan v. Sovereign Sec. Ltd.*, 726 F.2d 55, 60 (2d Cir. 1984) ("[Litigants]

---

[15] After it receives a motion filed under one or more of these rules within this 10-day time limit, the court obviously retains jurisdiction beyond the 10 days to rule on the motion. A final judgment that contains injunctive relief may give the court jurisdiction to enforce such relief. Such retention of jurisdiction is not implicated in any of the cases now before us.

may not use proceedings seeking relief from or modification of a judgment under F. R. Civ. P. 60 simply to relitigate matters settled by the original judgment. . . ."); *Kustom Signals, Inc. v. Applied Concepts, Inc.*, 247 F. Supp. 2d 1233, 1235 (D. Kan. 2003) ("Like a motion to reconsider, a motion under Rule 60(b) is not a second opportunity for the losing party to make its strongest case, to rehash arguments, or to dress up arguments that previously failed.").

What the foregoing discussion establishes, I believe, is that a legally significant analogy cannot be drawn between a motion to recall an appellate mandate and a motion or independent action brought under Rule 60(b). None of the motions or independent actions authorized by Rule 60(b) should assert that the petitioner's underlying criminal conviction or sentence is infirm on the basis of a constitutional claim that was or was not included in the habeas petition the petitioner litigated to final judgment in the district court. If such motions or independent actions present a constitutional claim, they must be dismissed unless the court of appeals has granted the petitioner leave to file the same in district court. The motions to recall the mandate discussed in *Calderon*, by comparison, seek the adjudication of constitutional claims; they do not constitute collateral attacks on the integrity of the court of appeals's judgment.[16] Hence, they differ from true Rule 60(b) motions and must be denied.

D.

Having distinguished between SSHPs and Rule 60(b) motions, I nonetheless share the majority's general concern that petitioners will disguise the former as the latter to avoid AEDPA's restrictions. We must craft a holding that curtails this abuse.

[16] If the district court judgment the court of appeals affirms is subject to collateral attack, the attack must be mounted in the district court via Rule 60(b), an independent action brought under the aegis of the Rule, or the implementation of one of the exceptions to the mandate rule.

We do not write on a blank slate here, as virtually all of our sister circuits have addressed this issue.[17] Some circuits have held that all Rule 60(b) motions are SSHPs, regardless of the nature of the claims presented. *See Lopez v. Douglas*, 141 F.3d 974, 975 (10th Cir. 1998) (holding without extended discussion that the petitioner's Rule 60(b) motion was an SSHP under AEDPA); *Gee v. Shillinger*, 1998 U.S. App. LEXIS 2644, *3-4 (10th Cir. 1998) (holding, without specifying exceptions, that Rule 60(b) motions are SSHPs under AEDPA); *McQueen v. Scroggy*, 99 F.3d 1302, 1335 (6th Cir. 1996) (holding in a pre-AEDPA context that "a Rule 60(b) motion is the practical equivalent of a successive habeas corpus petition and therefore is subject to a cause and prejudice analysis"). The Second Circuit, on the other hand, appears to have held that Rule 60(b) motions should never be treated as SSHPs. *Rodriguez*, 252 F.3d at 198 ("We now rule that a motion under Rule 60(b) to vacate a judgment denying habeas is not a second or successive habeas petition and should therefore be treated as any other motion under Rule 60(b).").[18]

Most of our sister circuits, however, have come down somewhere in the middle, holding that district courts may

[17] I am primarily concerned with the post-AEDPA cases, but also treat the pre-AEDPA cases from circuits that have not since ruled on the issue. For a collection of the pre-AEDPA cases, see 2 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* 1533 n.16 (4th ed. 2001).

[18] Although other courts have characterized the Second Circuit's position as absolute, *see, e.g., Rodwell*, 324 F.3d at 69 (stating that "[t]he Second Circuit has ruled categorically" that no Rule 60(b) motions are SSHPs); *Dunlap v. Litscher*, 301 F.3d 873, 876 (7th Cir. 2002) ("The Second Circuit[] . . . in *Rodriguez* . . . did not limit its ruling to [true Rule 60(b) motions]."), I do not wish to mischaracterize its holding. Even after *Rodriguez*, I am unable to say for certain that a litigant in the Second Circuit could maintain a purported Rule 60(b) motion whose true aim is to challenge the underlying conviction on constitutional grounds.

recharacterize Rule 60(b) motions as SSHPs under some circumstances. These circuits fall into two subsets. The first subset consists of courts that have declined to hold that all Rule 60(b) motions are SSHPs, but that have not articulated a rule for distinguishing these devices.[19] *See Boyd v. United States*., 304 F.3d 813, 814 (8th Cir. 2002) (directing district courts to "conduct[] a brief initial inquiry to determine whether the allegations in the Rule 60(b) motion in fact amount to a second or successive collateral attack"); *Thompson v. Calderon*, 151 F.3d 918, 921 & n.3 (9th Cir. 1998) ("We do not foreclose the possibility [that] a 60(b) motion filed after denial of an initial petition for habeas corpus would not have to comply with the AEDPA's successive petition requirements. . . . [A] bright line rule equating all 60(b) motions with successive habeas petitions would be improper."). The second subset consists of courts that have developed various, if general, rules for governing Rule 60(b) motions. *See United States v. Winestock*, 340 F.3d 200, 206 (4th Cir. 2003) ("[D]istrict courts *must* treat Rule 60(b) motions as successive collateral review applications when failing to do so would allow the applicant to 'evade the bar against relitigation of claims presented in a prior application or the bar against litigation of claims not presented in a prior application.'" (citation omitted)); *Rodwell*, 324 F.3d at 70 ("When the motion's factual predicate deals primarily with

[19] The Third and Fifth Circuits may also fall within this category, but their precedent is unclear. *See United States v. Edwards*, 309 F.3d 110, 113 (3d Cir. 2002) (holding without extended discussion that even if the district court should have construed the petitioner's motion under 18 U.S.C. § 3582(c)(2) as a Rule 60(b) motion, the court would nonetheless have had to recharacterize the Rule 60(b) motion as an SSHP); *Hess*, 281 F.3d at 214-15 (noting "the parties[']dispute [as to] whether or not [the Fifth Circuit] has completely closed the door on Rule 60(b) motions in habeas cases—in other words whether *all* such Rule 60(b) motions *must* be construed as successive petitions," but declining to decide the circumstances under which a Rule 60(b) motion might be proper).

the constitutionality of the underlying state conviction or sentence, then the motion should be treated as a second or successive habeas petition. This situation should be distinguished from one in which the motion's factual predicate deals primarily with some irregularity or procedural defect in the procurement of the judgment denying habeas relief. That is the classic function of a Rule 60(b) motion."); *Dunlap v. Litscher*, 301 F.3d 873, 875 (7th Cir. 2002) ("It is only when Rule 60(b) conflicts with AEDPA that it is unavailable to a prisoner.").

The majority today places our court near the middle ground. But rather than adopting a flexible rule that would permit district courts to honor AEDPA's aims without punishing true Rule 60(b) movants, the majority specifies a hard-and-fast exception to its holding that all Rule 60(b) motions are SSHPs: motions to remedy fraud upon the court under Rule 60(b)(3).

The majority is somehow convinced that the only way a habeas petitioner who seeks Rule 60(b) relief will be able to avoid AEDPA's restrictions on SSHPs is by asserting that the district court's judgment was fraudulently obtained. To be sure, "fraud, . . . misrepresentation, or other misconduct [perpetrated by the respondent]" is *one* valid ground for seeking relief from a habeas judgment under Rule 60(b) without implicating § 2244's requirements, as many of our sister circuits have recognized. *See Winestock*, 340 F.3d at 207; *Dunlap*, 301 F.3d at 876; *Rodriguez*, 252 F.3d at 199; *Thompson*, 151 F.3d at 921 n.3. Obviously, such misconduct is not the only reason to doubt the legitimacy of a habeas judgment.

Rather than follow the majority's approach, we should recognize that Rule 60(b) survives in AEDPA's wake and fashion a holding that accounts for the essential differences between Rule 60(b) motions and SSHPs. In this vein, I would adopt substantially the First Circuit's solution to our problem:

> The inquiry must proceed case by case. The [district] court must examine the factual predicate set forth in support of a particular motion. When the motion's factual predicate deals primarily with the constitutionality of the underlying state [or federal] conviction or sentence, then the motion should be treated as a second or successive habeas petition. This situation should be distinguished from one in which the motion's factual predicate deals primarily with some irregularity or procedural defect in the procurement of the judgment denying habeas relief. That is the classic function of a Rule 60(b) motion, and such a motion should be treated within the usual confines of Rule 60(b).

Rodwell, 324 F.3d at 70 (citation omitted); cf. *Lazo v. United States*, 314 F.3d 571, 573 (11th Cir. 2002) (vacated panel opinion) (concluding that Lazo's purported Rule 6.0(b) motion was the "functional equivalent of a successive § 2255 motion"). To further guide the district courts, I would repeat the observation I made in my dissent from the *Mobley* panel:[20]

[20] I would also reemphasize that district courts should treat Rule 60(b)(6) motions with special caution. Rule 60(b)(6) allows a court to grant relief from a judgment for "any other reason" beyond those specified in Rule 60(b)(1)-(5). *See Klapprott*, 335 U.S. at 614-15, 69 S. Ct. at 390 ("[I]n simple English, the language of the 'other reason' clause, for all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice."). As the Supreme Court has held, "[t]o justify relief under subsection (6), a party must show 'extraordinary circumstances' suggesting that the party is faultless in the delay." *Pioneer Inv. Serv. Co. v. Brunswick Assn Ltd. P'ship*, 507 U.S. 380, 393, 113 S. Ct. 1489, 1497, 123 L. Ed. 2d 74 (1993). The amorphousness of this subsection makes it particularly prone to abuse. As I noted in *Mobley*, "[a] district court that uses this 'catch-all' provision to allow a habeas corpus petitioner to obtain review of a new constitutional claim will . . . eviscerate the provisions of AEDPA." 306 F.3d at 1102 n.3 (Tjoflat, J., dissenting).

> [I]f a petitioner[ ] who already has been denied federal habeas corpus relief files a motion that presents new constitutional claims to the district court, this motion should be considered a "second or successive" habeas corpus petition—even if the petitioner calls it a Rule 60(b) motion. Likewise, if the petitioner [br]ought a "second or successive" habeas corpus petition to raise questions about the integrity of a prior habeas corpus proceeding . . . then the court should review the filing under the standards for Rule 60(b) motions and not under the strictures of 28 U.S.C. 2244(b)(2).

306 F.3d at 1101-02 (Tjoflat, J., dissenting); *accord Winestock*, 340 F.3d at 207 ("[A] brand-new, free-standing allegation of constitutional error in the underlying criminal judgment will virtually always implicate the rules governing successive applications. Similarly, new legal arguments or proffers of additional evidence will usually signify that the prisoner is not seeking relief available under Rule 60(b) but is instead continuing his collateral attack on his conviction or sentence." (citations omitted)). If the court finds that the motion states a valid ground for relief under Rule 60(b), it may entertain the motion. If it instead determines that the filing is an SSHP parading as a Rule 60(b) motion, then § 2244 applies.[21] In the latter case, the district court may not entertain the SSHP without our authorization. 28 U.S.C. § 2244(b)(3)(A). If the petitioner has not obtained our authorization, the district court must reject his motion for lack of subject matter jurisdiction. *See Winestock*, 340 F.3d at 208-09 (vacating the district court's denial of the petitioner's

[21] In discussing how a district court should treat true Rule 60(b) motions and SSHPs masquerading as Rule 60(b) motions, I omit reference to what might be termed "mixed" Rule 60(b) motions—motions that are in part true Rule 60(b) motions and in part SSHPs. A district judge should have no difficulty weeding out the SSHP allegations, disposing of them for lack of jurisdiction, and then passing on the merits of the allegations that are actually cognizable under the Rule.

purported Rule 60(b) motion and remanding with the instruction to dismiss for lack of jurisdiction); *Rodwell*, 324 F.3d at 73 (affirming the district court's dismissal of an SSHP dressed as a Rule 60(b) motion); *Dunlap*, 301 F.3d at 876-77 (holding that the district court erred in failing to recharacterize a Rule 60(b) motion as an SSHP and reversing with the instruction to dismiss for lack of jurisdiction); *United States v. Rich*, 141 F.3d 550, 554 (5th Cir. 1998) (affirming the district court's dismissal of the petitioner's filing for lack of jurisdiction).

Although "this test [would not] operate with mathematical precision," *Rodwell*, 324 F.3d at 71, it elevates substance over form and satisfies the independent aims of AEDPA and Rule 60(b). Like the First Circuit, I am "confident that . . . the district courts [would] be able to sift wheat from chaff without undue difficulty." *Id.*

III.

Pursuant to 28 U.S.C. § 2253(c)(1),

> Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.[22]

[22] The petitioner must first seek a COA from the district court. 11th Cir. R. 22-1(a). If the district court denies a COA, the petitioner may seek one from our court. Fed. R. App. P. 22(b)(1). Furthermore,

> if the district court denies a [COA], and at the time of docketing the appeal in [our court] the [petitioner] has not filed a renewed application for a [COA] in [our court], the application denied by the district court . . . shall be construed by [our court] as a renewed application for a [COA].

11th Cir. R. 22-1(c)(2).

After reducing Rule 60(b)'s scope to claims of fraud, the majority holds that § 2253 requires habeas petitioners to obtain a COA before appealing the denial of Rule 60(b)(3) relief. I cannot ascribe to this holding because § 2253's plain language discloses no such requirement. Neither can I ascribe to the majority's reliance on the decisions in other circuits that might appear to, but do not, support its position.

A.

Courts of appeals have jurisdiction "of appeals from all final decisions of the district courts . . . ." 28 U.S.C. § 1291. A litigant faced with an unfavorable district court judgment may make a timely appeal of that judgment and may also file a Rule 60(b) motion for relief with the district court either before or after filing his appeal. *See Stone v. Immigration and Naturalization Serv.*, 514 U.S. 386, 401, 115 S. Ct. 1537, 1547, 131 L. Ed. 2d 465. (1995). "The denial of the [Rule 60(b)] motion is appealable as a separate final order . . . ." *Id.* Thus, an order adjudicating a Rule 60(b) motion, in addition to a final judgment adjudicating the case as a whole, is an appealable, final decision.

Although our appellate jurisdiction extends to all final decisions, § 2253's COA requirement does not. As a textual matter, § 2253 requires a COA to appeal only *one* final order in a habeas corpus proceeding, not all orders. *See* 28 U.S.C. § 2253(c)(1) (providing that the COA requirement applies to "*the* final order" in proceedings attacking state or federal convictions or sentences (emphasis added)).

In habeas cases involving more than one appealable order, such as orders disposing of Rule 60(b) motions or other postjudgment motions, § 2253's requirement of a COA as to the appeal of just *one* final order clearly extends to the petitioner's efforts, if any, to appeal the court's final judgment denying him habeas relief. The district court's judgment on the habeas petition is seemingly the only "final decision" that

could deny the petitioner's constitutional challenge to his conviction or sentence. Therefore, that judgment is the only decision that § 2253(c)(2) seems to address; it is the only final order that could serve as the basis for the petitioner's "substantial showing of the denial of a constitutional right[,]" the showing he must make to obtain the COA. In contrast to judgments denying habeas relief, final orders denying a Rule 60(b) motion do not adjudicate a constitutional challenge to the movant's conviction or sentence. They simply state that the district court will not exercise its discretion to set aside the final judgment it entered.[23]

I agree with the majority's statement that the word "the" can sometimes be read in the plural. In certain circumstances, singular terms can be construed in the plural. *See* 1 U.S.C. § 1 ("[U]nless the context indicates otherwise[,] words importing the singular include and apply to several persons, parties, or things . . . ."). "But obviously this rule is not one to be applied except where it is necessary to carry out the evident intent of the statute." *First Nat'l Bank in St. Louis v. Missouri*, 263 U.S. 640, 657, 44 S. Ct. 213, 215, 68 L. Ed. 486 (1924) (interpreting the predecessor rule that "words importing the singular number may extend and be applied to several persons or things"); *see also Toy Mfrs. of America, Inc. v. Consumer Prods. Safety Comm'n*, 630 F.2d 70, 74 (2nd Cir. 1980) (holding that 1 U.S.C. § 1 does not apply "except where it is necessary to carry out the evident intent of the statute"). AEDPA evinces no legislative intent to apply the COA requirement to more than one order. Nor does it evince legislative intent to apply the § 2253(c)(2) requirement of a "substantial showing" to an order that does not determine whether the petitioner has suffered the denial of a constitutional right. While AEDPA clearly limits appeals of the denial of habeas relief, there is nothing in the text of the Act

[23] This point is discussed at length in Part IV, *infra*.

that narrows the reach of Rule 60(b) or the independent collateral attacks the Rule authorizes. Thus, interpreting "the" in the plural would be improper in this context, and § 2253 must apply to one final order: the district court's final judgment on the habeas petition.

B.

I respectfully decline to join in the majority's reliance on the decisions of our sister circuits for the proposition that the COA requirement of § 2253 extends to appeals of the denial of Rule 60(b) relief. By and large, the courts, in reaching these decisions, simply assumed that § 2253 applies in the Rule 60(b) context. Moreover, most of these cases involve obvious misuses of the Rule and are therefore inapposite to circumstances involving true Rule 60(b) motions. *See Rutledge v. United States*, 230 F.3d 1041, 1052-53 (7th Cir. 2000) (considering an appeal from the denial of a Rule 60(b) motion based on an ineffective assistance of counsel claim that the petitioner "should have raised . . . in his § 2255 motion"); *Morris v. Horn*, 187 F.3d 333, 343 (3d Cir. 1999) ("What [the habeas petitioner] is attempting to raise as a Rule 60(b) motion is in fact what he should have brought as an appeal" from the district court's dismissal of his habeas petition for failure to exhaust state remedies.); *Zeitvogel v. Bowersox*, 103 F.3d 56, 57 (8th Cir. 1996) (refusing to grant a COA to review the denial of the petitioner's purported Rule 60(b) motion because the motion merely presented a constitutional claim, ineffective assistance of counsel, that the petitioner had previously raised in a motion for leave to file an SSHP).[24] I suggest that a fair reading of the opinions in these cases indicates that none of the motions at issue was a true Rule 60(b) motion.

[24] The majority also relies on *Kellogg v. Strack*, 269 F.3d 100 (per curiam) (2d Cir. 2001). The grounds for the petitioner's Rule 60(b) motion in that case are unclear from the court's opinion.

Langford v. Day, 134 F.3d 1381, 1382 (9th Cir. 1998), also relied on by the majority, remains as a possible outlier. In that case, the petitioner, Langford, was convicted of capital murder by a Montana court and sentenced to death. At the time sentence was imposed, Montana law prescribed hanging or lethal injection as the means of execution. The trial court allowed the petitioner to choose the means of execution, and he chose hanging. In challenging his sentence on direct appeal and on federal habeas corpus, the petitioner unsuccessfully claimed that hanging violated the Eighth Amendment. Prior to the date set for his execution, "the Montana legislature abolished hanging, leaving only lethal injection as a means of execution." *Id.* at 1382. The petitioner thereafter filed a Rule 60(b) motion in the district court, alleging that this change in Montana law authorized the court to revisit its judgment denying his petition for habeas corpus relief. The court denied his motion, and the petitioner filed a notice of appeal.

The court of appeals interpreted its pre-AEDPA precedent, *Lynch v. Blodgett*, 999 F.2d 401, 402-03 (9th Cir. 1993), to preclude it from entertaining a petitioner's appeal absent a certificate of probable cause (the COA's pre-AEDPA analog). In the court's view, AEDPA required a COA in all circumstances in which a certificate of probable cause was previously required. Because the petitioner could obtain neither a COA nor a certificate of probable cause, the court did not decide whether AEDPA or pre-AEDPA law applied.[25] In

[25] While *Langford* is not entirely clear on this issue, I assume that AEDPA's effective date fell after the petitioner filed his motion but before he filed his notice of appeal. The Supreme Court had not settled the question whether AEDPA's COA requirement applied in this circumstance until after 1998, the year of the *Langford* decision. *See Slack v. McDaniel*, 529 U.S. 473, 481, 120 S. Ct. 1595, 1602, 146 L. Ed. 2d 542 (2000) (holding that "§ 2253 applies to appellate proceedings initiated post-AEDPA[,]" even when the underlying habeas proceeding was initiated a district court pre-AEDPA).

other words, the denial of a meritorious constitutional claim was required in either case, and petitioner failed to show this. *Langford*, 134 F.3d at 1382.

The Ninth Circuit's decision in Lynch, the basis for *Langford's* result, relied on this circuit's decision in *Lindsey v. Thigpen*, 875 F.2d 1509, 1512 (11th Cir. 1989) (per curiam). *Lindsey*, however, is inapposite to *Langford* and to the three cases we decide today. First, in *Lindsey*, a pre-AEDPA case, we had no opportunity to consider AEDPA's SSHP restrictions. Second, the petitioner in Lindsey did not file a true Rule 60(b) motion, even though he labeled it as such. The petitioner alleged in his motion, which challenged the constitutionality of his death sentence, that (1) "the district court should reconsider his claim regarding the 'especially heinous, atrocious or cruel' aggravating factor in light of [*Maynard v.*] *Cartwright*[, 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988)]"; and (2) "the trial judge's override of the jury's recommendation of life imprisonment violated the sixth amendment . . . ." *Lindsey*, 875 F.2d at 1511. Because his filing was really an SSHP in Rule 60(b)'s clothing, the petitioner would today have to obtain leave of this court under § 2244(b)(3) before presenting the SSHP to the district court.[26]

[26] This conclusion is not, as the majority suggests, in tension with my observation that § 2253 requires a COA only to appeal the district court's judgment denying habeas relief. *See* Maj. op. at 27 nn. 3-4. An appeal of a district court's dismissal of an SSHP (clothed as a Rule 60(b) motion) for lack of § 2244 leave to proceed requires no COA because it involves only a preliminary jurisdictional inquiry: whether the district court was correct in concluding that it did not have a true Rule 60(b) motion, which it should entertain, before it. Of course, if a petitioner filed an SSHP in the district court after obtaining § 2244 leave, the district court's denial of the SSHP would be "the final order in a habeas corpus proceeding" under § 2253(c)(1). The petitioner would therefore need a COA to appeal the district court's denial.

In *Langford*, 134 F.3d at 1382, by contrast, at least in the Ninth Circuit's view, the petitioner's so-called Rule 60(b) motion "sought relief from a judgment of the district court denying Langford's petition for habeas corpus . . . ."[27] It did not assert constitutional claims attacking his underlying conviction or sentence. Consequently, his motion was not an SSHP, and no COA should have been required to appeal its denial. Ultimately, the *Langford* court made the same error our panel made in *Mobley*: it failed to comprehend that *Lindsey* and cases like it are limited to misuses of Rule 60(b).

IV.

Before suggesting the dispositions the court should make in these consolidated appeals, I think it useful to discuss the practical implications of the majority holdings. To recap, the majority holds, first, that (with the exception of a motion filed under Rule 60(b)(3)) to obtain relief under Rule 60(b), a petitioner must apply to this court for leave to file his motion. In doing so, he must satisfy the requirements of § 2244(b)(2), meaning that:

> (A) . . . the claim [set forth in his motion] relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [him] guilty of the underlying offense.

[27] We rely on the Ninth Circuit's view as to the content of the petitioner's claims. Obviously, the record of that case is not before us.

Thus, the majority separates Rule 60(b) motions into two groups: first, Rule 60(b)(3) motions, which are to be presented to the district court; and second, Rule 60(b)(1), (2), and (4)-(6) motions, which the majority treats as SSHPs that must be presented to this court as § 2244(b)(2) applications for leave to seek relief in the district court. The majority next holds that before the petitioner can appeal the district court's denial of his Rule 60(b)(3) motion, he must obtain a COA. This means that his application for a COA must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Given these holdings, I now illustrate what Rule 60(b) litigation will look like from now on.

With respect to the Rule 60(b)(3) motions, the majority opinion does not come into play until the distract court has denied relief and the petitioner seeks to appeal the denial. The petitioner cannot appeal unless and until he obtains a COA by making the requisite § 2253(c)(2) "substantial showing of the denial of a constitutional right." With respect to motions seeking relief under Rule 60(b)(1), (2), and (4)-(6), the majority opinion comes immediately into play. The petitioner must apply to this court for leave to proceed in the district court; to obtain such leave, he must satisfy the requirements of § 2244(b)(2)(A), (B), quoted above. In short, whether the petitioner is seeking relief on these Rule 60(b) grounds or under Rule 60(b)(3), his motion will have to convince the court that he is presenting a constitutional challenge to his underlying conviction or sentence.

In examining his motion for a constitutional claim, the court will find none. Why? Because the petitioner has filed a true Rule 60(b) motion, and such motions do not contain constitutional claims. *See supra* Part II.B. The petitioner might obtain a COA in the 60(b)(3) context only if the court —the district court or this court looks beyond the Rule 60(b)— motion to his habeas petition to determine whether the petitioner there presented a constitutional claim that satisfies

§ 2253(c)(2)'s "substantial showing" requirement. The petitioner will never prevail on a motion under Rule 60(b)(l), (2), (4), (5), or (6) because the petitioner's application to this court for leave[28] to file such a motion will not satisfy either of § 2244(b)(2)'s alternative requirements.[29] Why? Because the text of those requirements, taken literally, precludes the court from looking beyond the Rule 60(b) motion by limiting the court to a consideration of "claim[s] presented in a second or

[28] Suppose the petitioner does not seek § 2244(b)(3)(A) leave of this court to file in the district court a Rule 60(b) motion under subparts (1), (2), (4), (5), or (6) but, instead, files the motion in the district court. The district court denies the motion, and the petitioner files a notice of appeal, invoking our 28 U.S.C. § 1291 jurisdiction. Would the majority require the issuance of a COA as a condition precedent to entertaining the appeal, or would the majority permit the appeal to proceed without a COA? I do not find an explicit answer to this question in the majority opinion. The majority's disposition of the *Gonzalez* case, however, implies that a COA must be obtained. Gonzalez sought relief from a habeas judgment in the district court on a Rule 60(b)(6) ground, namely that a subsequent decision of the Supreme Court cast doubt on that habeas judgment. The district court denied his Rule 60(b) motion, and Gonzalez filed a notice of appeal. In disposing of this case, the majority now grants a COA and then affirms the district court because the Rule 60(b) motion did not claim fraud, which is the only Rule 60(b) claim that remains available to collaterally attack the denial of a habeas corpus petition. I question the wisdom of having this court expend its resources deciding to issue a COA and then passing on the merits of Gonzalez's appeal. Instead of taking these steps, it would be more efficient simply to dismiss the appeal on the ground that a Rule 60(b) motion is no longer available. Had the district court not granted Gonzalez leave to appeal IFP and he applied to this court for such leave, this court could have denied it on the ground that the appeal was frivolous.

[29] Nor could a true Rule 60(b) motion satisfy the comparable criteria of § 2255, which applies to federal prisoners. *See supra* note 5. As true Rule 60(b) motions filed in a § 2255 proceeding would challenge only the § 2255 judgment, no such motion could assert that the prisoner's conviction or sentence was imposed "imposed in violation of the Constitution or laws of the United States."

successive habeas corpus application under section 2254 that was not presented in a prior application. . . ."

The bottom line of this discussion is twofold. First, the majority completely eviscerates Rule 60(b)(l), (2), and (4)-(6). As they apply to habeas petitioners, these provisions are now off the books in the Eleventh Circuit.[30] Second, the majority does away with a significant part of a petitioner's right to prosecute a true Rule 60(b)(3) motion. The petitioner may file the motion, but if the district court denies it, whether he will obtain a COA and thus be able to appeal the denial is problematic.[31]

[30] In writing Rule 60(b)(1), (2), (4)46) off the books, what the majority seems to be holding is that Congress, in enacting AEÐPA, repealed these provisions by implication. But "[i]n the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Morton v. Mancari*, 417 U.S. 535, 550, 94 S. Ct. 2474, 2482, 41 L. Ed. 2d 290 (1974). Tellingly, Congress was not blind to the effects AEDPA would have on the rules of procedure; for example, focusing on the relevant Federal Rules of Appellate Procedure, Congress amended Federal Rule of Appellate Procedure 22. *See* AEDPA of 1996, Pub. L. No. 104-132, 110 Stat. 1214 § 103. Congress did nothing, however, to Rule 60(b); rather, it simply let the Rule stand as is. In allowing Rule 60(b) to stand while limiting the availability of habeas relief under AEDPA, Congress did not create an "irreconcilable" situation. There is nothing irreconcilable about cutting down on SSHPs and at the same time permitting the district courts to set aside a habeas judgment that should not stand under Rule 60(b).

[31] I note here that the petitioner's respondent (the State) does not have to obtain a COA as a condition precedent to appealing a district court's order setting aside the final order (that denied the petitioner habeas relief). AEDPA extends the COA requirement only to petitioners, not to respondents. Section 103 of AEDPA expressly amended the Federal Rules of Appellate Procedure to guarantee this result. *See* AEDPA of 1996, Pub. L. No. 104-132, 110 Stat. 1214 § 103; Fed. R. App. P. 22(b)(3) ("A certificate of appealability is not required when a state or its representative or the United States or its representative appeals.").

I further explain this second consequence of the majority opinion by examining four hypothetical scenarios. These scenarios consider how a court's decision whether to grant a COA as to a judgment denying a habeas petition would affect the decision whether to grant a COA as to an order denying a Rule 60(b)(3) motion. Before I begin, though, two observations must be made about the assumptions underlying the scenarios.

First, a Rule 60(b) motion that states a new constitutional claim is an SSHP, and the district court, lacking jurisdiction to entertain it, must reject it on that ground.[32] *See supra* Part II.D. Thus, in discussing the implications of the majority's holdings, I refer to time Rule 60(b) motions (which by definition do not state a constitutional claim).

Second, because a true Rule 60(b)(3) motion does not contain a constitutional challenge to the petitioner's state court conviction or sentence, the question becomes: where would the COA court look to determine whether the petitioner has made "a substantial showing of the denial of a constitutional right?" The majority's answer to this question is that the court—the district court or this court-must look somewhere else. In deciding these appeals, the majority chooses to examine two sources. In *Lazo*, for example, the majority examines the allegations of the petitioner's motion, which was brought under "Rule 60(b)(4) and/or (6)." The motion was an SSHP because it alleged the denial of constitutional rights. Finding no merit in the constitutional claims the motion presented, the majority denies a COA. In *Gonzalez*, however, the majority faces a true Rule 60(b)(6) motion. Because the Rule 60(b) motion does not contain constitutional claims, the majority looks not to the motion but to the allegations of the petitioner's habeas petition for

[32] To obtain relief in the district court, therefore, the petitioner must first obtain leave of this court pursuant to § 2244(b)(3)(A).

evidence of the denial of a constitutional right. The majority concludes that such evidence satisfies the constitutional-claim element of § 2253(c)(2) because the majority "cannot say that Gonzalez's claim is not debatable among jurists of reason." Maj. op. at 32. Having so concluded, the majority grants a COA and then affirms the district court's decision. Finally, in *Mobley*, the majority looks, as in *Lazo*, to the allegations of the Rule 60(b) motion, concludes that such allegations satisfy § 2253(c)(2)'s "substantial showing," grants a COA, and then affirms the district court's decision.

I now turn to the four hypothetical scenarios, each involving a true Rule 60(b)(3) motion, to illustrate how the majority's holding—that the petitioner must obtain a COA in order to appeal the denial of his motion—will play out.

In the first scenario, the petitioner obtained a COA to appeal the denial of habeas relief, and we affirmed on appeal. The petitioner then moved the district court pursuant to Rule 60(b)(3) to set aside its decision on the ground that is decision was obtained through fraud. The district court denied the motion. Can the petitioner obtain a COA to appeal? Our earlier affirmance of the district court's rejection of the petitioner's constitutional claims should prompt the district court and this court to say that the petitioner cannot satisfy § 2253(c)(2)'s requirement that he make a "substantial showing of the denial of a constitutional right." If a COA were to issue, it would cast doubt on the correctness of our earlier decision affirming the district court's denial of habeas relief; hence, issuing a COA is not in the cards. **Result: In this situation, the petitioner never obtains a COA to appeal.**

In the second scenario, the petitioner sought to appeal the district court's order denying habeas relief but failed to obtain a COA. The petitioner thereafter moved the district court to set aside its decision under Rule 60(b)(3), and the court denied the motion. Can a COA issue so that the petitioner can appeal the ruling? Yes, but in issuing the COA, the court the

district court or this court would be casting doubt on the correctness of the earlier decision denying the COA. Absent a sound reason for effectively overruling the prior COA denial, I suggest that a COA would not issue. **Result: In this situation, the petitioner never obtains a COA.**

In the third scenario, this court granted a COA, and while the petitioner's appeal was pending, the petitioner moved the district court to set aside its decision under Rule 60(b)(3).[33] The court denied the motion. Is a COA likely to issue? Since the district court or this court previously found that the petitioner had made a § 2253(c)(2) "substantial showing of the denial of a constitutional right" and the appeal is still pending, I suggest that a COA would issue and the petitioner's appeal of the Rule 60(b)(3) ruling would proceed.[34] **Result: In this situation, the petitioner obtains a COA.**

In the fourth scenario, the district court denied habeas relief, and the petitioner did not appeal. After the thirty-day appeal period expired, the petitioner filed a Rule 60(b)(3) motion. The court denied the motion, and the petitioner applied for a COA. He obtains a COA if the allegations of his habeas petition satisfy § 2253(c)(2)'s "substantial showing" criterion. **Result: In this situation, the petitioner might obtain a COA.**

In sum, these four scenarios indicate that under the majority's § 2253(c)(2) holding, the merit of a petitioner's Rule

---

[33] The district court has jurisdiction to consider the Rule 60(b)(3) motion even though the petitioner's appeal of the denial of habeas relief is pending. *Stone v. Immigration and Naturalization Serv.*, 514 U.S. 386, 401, 115 S. Ct. 1537, 1547, 131 L. Ed. 2d 465 (1995) ("Either before or after filing his appeal, the litigant may also file a Rule 60(b) motion for relief with the district court. The denial of the motion is appealable as a separate final order, and if the original appeal is still pending it would seem that the court of appeals can consolidate the proceedings.").

[34] This scenario is not likely to occur. In fact, in over 28 years on this court and its predecessor Fifth Circuit, I have never encountered it.

60(b)(3) motion will have no bearing on the court's decision on whether to grant a COA. Under § 2253(c)(2), the only question for the COA court is whether the petitioner has "made a substantial showing of the denial of a constitutional right." All that a true Rule 60(b)(3) motion alleges is that the petitioner's adversary obtained a final order through fraud from the district court. It does not address the sufficiency of the petitioner's claim that his conviction or sentence was obtained in violation of the Constitution.

V.

Having expressed my disagreement with the majority's principal holdings, I turn to the appeals before us, *Lazo*, *Gonzalez*, and *Mobley*.

A.

On January 2, 2002, after Emile Lazo had lost his first § 2255 motion and failed to obtain a COA to appeal, he "filed a motion and brief, which he labeled as being pursuant to Fed. R. Crim. P. 12(b)(2) and Fed. R. Civ. P. 60(b)(4), (6), seeking relief from the district court's previous denial of his § 2255 motion." *Lazo v. United States*, 314 F.3d 571, 572 (11th Cir. 2002) (vacated panel opinion). In this motion, Lazo claimed that

> his conviction is void because the district court lacked subject matter jurisdiction to hear his case and impose a sentence because the indictment was insufficient[,] the grand jury failed to allege an interference with interstate and/or foreign commerce under 21 U.S.C. § 801, failed to give him "notice" as to the penalty against which he must defend in violation of the Sixth Amendment, and failed to give jurisdiction to the sentencing court to impose his sentence under 21 U.S.C. § 841(b)(1)(A) by failing to establish an interference with interstate commerce.

Id. at 573. On March 1, 2002, the district court denied the motion without explanation—and without indicating whether it was treating Lazo's filing as a true Rule 60(b) motion or as an SSHP. On April 30, 2002, Lazo filed a notice of appeal[35] and applications for leave to proceed *in forma pauperis*, ("IFP") and for a COA. The court granted his application for IFP but denied a COA.

We thereafter noted probable jurisdiction and the appeal was briefed. Addressing the threshold question the appeal posed—whether the motion Lazo filed in the district court should be treated as a second or successive motion under 28 U.S.C. § 2255—a panel of this court answered in the affirmative. In the panel's view, Lazo's motion was "really a successive § 2255 motion in Rule 60(b)'s clothing," since it merely "[made] new arguments attacking the validity of [the] sentence," and did not articulate a valid ground of relief under Rule 60(b). *Id.* at 573. Because Lazo had not obtained leave to file a successive petition under 28 U.S.C. § 2244(b)(3)(A),[36] the panel recognized that the district court should

[35] Lazo had 60 days from the date of the district court's decision to file a notice of appeal. *See* Fed. R. App. P. 4(a)(1)(B).

[36] Section 2255 states that

> [a] second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—
>
> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

The reference to § 2244 is to § 2244(b)(3)(A), which states:

> Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

have dismissed Lazo's purported Rule 60(b) motion for lack of jurisdiction. The panel nonetheless determined that "the district court's denial of [Lazo's] successive § 2255 motion. [was] a 'final order' in a § 2255 proceeding,'" and that Lazo needed a COA to appeal that denial. *Id.* at 575. The panel then construed Lazo's notice of appeal as a motion for a COA and denied it. *Id.* at 574-75.[37]

I agree with the panel that Lazo's Rule 60(b) motion was really an SSHP, and that the district court lacked jurisdiction to consider it. Thus, rather than "denying" the motion without explanation—which implied that the court was adjudicating the motion on its merits-the district court should have dismissed it for lack of jurisdiction. The panel, in turn, should have affirmed the district court's judgment on the ground that the district court lacked jurisdiction to entertain Lazo's motion. The majority should also affirm on that ground. Instead, the majority searches for a § 2253(c)(2) showing of "a denial of a constitutional right" and denies a COA, which means that Lazo cannot prosecute his appeal. By operation of law, therefore, the district court's decision stands.

B.

On September 9, 1998, the district court entered a final order dismissing Aurelio Gonzalez's § 2254 petition as time-barred under 28 U.S.C. § 2244(d)(1) because the petition had not been filed within AEDPA's one-year limitations period. *Gonzalez v. Sec. for the Dept of Corr.*, 317 F.3d 1308, 1310 (11th Cir. 2003). Gonzalez filed a timely notice of appeal and applied for a COA. The district court denied his application;

[37] Relying upon *Slack v. McDaniel*, 529 U.S. 473, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000), the panel determined that a COA could not issue because of a "plain procedural bar," i.e., Lazo's failure to seek leave from our court to file a successive petition. *Lazo*, 314 F.3d at 574.

we did likewise on April 6, 2000. *Id.* at 1310. The consequence of our denial of a COA for Gonzalez was that the district court's final order stood as if we had affirmed it on appeal.

On August 2, 2001, Gonzalez, proceeding *pro se*, "filed a Rule 60(b) motion asking the district court to reconsider its . . . order denying him habeas relief on statute of limitations grounds in light of the intervening Supreme Court decision in *Artuz v. Bennett*, 531 U.S. 4, 121 S. Ct. 361, 148 L. Ed. 2d 213 (2000), which interpreted the 'properly filed' clause of the tolling provision contained in § 2244(d)(2)." *Gonzalez*, 317 F.3d at 1310. As I read Gonzalez's somewhat disjointed handwritten motion, he contends that had *Artuz* been decided before the district court ruled on the timeliness of his habeas petition, the court would not have held it time barred. The district court denied Gonzalez's motion on March 5, 2002, because the "[p]etitioner already ha[d] taken an appeal to the Eleventh Circuit. Accordingly, [the court] no longer ha[d] jurisdiction over his claims." Gonzalez filed a timely notice of appeal, and applications to proceed IFP and for a COA. The district court refused to issue a COA, but it granted Gonzalez leave to appeal IFP.

Gonzalez then applied to this court for a COA. A panel of the court acknowledged that Gonzalez's motion is a true Rule 60(b) motion, filed apparently under Rule 60(b)(6),[38] but, as the majority does today, denied his application. *Id.* At 1311-13. The panel did so "[f]or two independently adequate reasons." *Id.* First, it held that under our decision in *Mobley v. Head*, 306 F.3d 1096 (11th Cir. 2002) (from which I dissented), "all Rule 60(b) motions in habeas cases are to be treated as second or successive petitions." *Gonzalez*, 317 F.3d

[38] Rule 60(b)(6) authorizes a district court to vacate its final judgment for "any other reason justifying relief from the operation of the judgment."

at 1312. Second and alternatively, the panel found that the "extraordinary circumstances" that *Ritter v. Smith*, 811 F.2d 1398 (11th Cir. 1987), requires as a condition precedent to granting Rule 60(b)(6) relief were absent. *Id.* at 1312-13. According to the panel, Gonzalez had not shown that

> (1) the erroneous judgment had not been executed; (2) there was only minimal delay between the entry of the judgment the motion sought to set aside and the filing of the motion; and (3) there was a close connection between the case and the case that gave rise to the intervening decision upon which the motion was based.

Id. at 1313.

We review district court denials of Rule 60(b) motions for abuse of discretion. *Davis v. Fla. Power & Light Co.*, 205 F.3d 1301, 1304 n.4 (11th Cir. 2000). Applying that standard, the panel refused to issue a COA because it "[did] not find it debatable among jurists of reason whether the denial of Gonzalez's Rule 60(b) motion was an abuse of discretion." *Gonzalez*, 317 F.3d at at 1312. The panel so held even though the distract court had not entertained the motion because it mistakenly thought that it lacked jurisdiction to hear it.

I disagree with the panel's decision, notwithstanding that it has been vacated by the order taking this case en banc. I disagree because it is hornbook law that a district court abuses its discretion when it misapplies the law in reaching its decision. Here, the district court misapplied the law; it erroneously denied the motion because it thought it lacked jurisdiction to hear it. I would therefore vacate the district court's ruling and remand the case with the instruction that the court consider the motion on its merits.

The majority, however, issues a COA[39] and affirms the district court's decision as if the district court had actually entertained Gonzalez's motion and ruled on its merits:

> Gonzalez does not contend that there was any clerical error in the final judgment denying him federal habeas relief, or that fraud was used to obtain that judgment. His sole contention is that the [district court's] judgment [denying habeas relief] was wrong, because the subsequently released [Supreme Court] decision in [*Artuz*] shows that the "properly filed" language of § 2244(d)(2) was misinterpreted to deny him relief. He is attacking the merits of that decision—the term "merits" referring to the correctness of the decision itself even though the ground of this particular decision was the statute of limitations, an affirmative defense.
>
> Gonzalez's Rule 60(b) motion is an attempt to relitigate a claim that has already been presented in a prior application [for a COA] and rejected, which means it must be dismissed under § 2244(b)(1). . . . An error of law, even one demonstrated by an intervening decision, does not fit either of the extra-statutory exceptions to the rule we have borrowed from *Calderon* and announced today.

Maj. op. at 64.

---

[39] In deciding whether to issue Gonzalez a COA, the majority looks to his habeas petition (which the district court had denied) to see whether he has made the § 2253(c)(2) substantial showing of the denial of a constitutional right. According to the majority, the petition alleged that Gonzalez's "guilty plea was unintelligent, unknowing, and involuntary based on specific evidence he has proffered." Maj. op. at 32. The majority concludes that Gonzalez satisfies § 2253(c)(2)'s requirement because it "cannot say that Gonzalez's claim is not debatable among jurists of reason." *Id.* I submit that looking beyond Gonzalez's Rule 60(b) motion—to the habeas petition—for evidence of the denial of a constitutional right is contrary to this court's statement in *Gulf Coast Fans, Inc. v. Midwest Elecs. Imp., Inc.*, 740 F.2d 1499, 1507 (11th Cir. 1984), that our review of a district court's disposition of a Rule 60(b) motion is "restricted to those issues raised in [the movant's] Rule 60(b) motion."

What the majority overlooks is that Gonzalez's Rule 60(b) motion seeks, in legal effect, to invoke an exception to the mandate rule.[40] As I state above, the legal effect of our denial of a COA to review the district court's final decision denying habeas relief is that the district court's final decision stands as if affirmed by this court. That is, for the purposes of the mandate rule, the order we entered denying a COA was the functional equivalent of a mandate from this court affirming the district court's decision.[41]

The district court denied relief on the ground that AE DPA's one-year limitations period barred Gonzalez's § 2254 petition. The mandate rule precludes Gonzalez from asking the district court to reconsider its decision unless he can base his request on one of the exceptions to the rule:

> The "mandate rule," as it is known, is nothing more than a specific application of the "law of the case" doctrine. This doctrine stands for the proposition that an appellate decision on an issue must be followed in all subsequent trial court proceedings unless the presentation of new evidence or an intervening change in the controlling law dictates a different result, or the appellate decision is clearly erroneous and, if implemented, would work a manifest injustice.

Piambino v. Bailey, 757 F.2d 1112, 1120 (11th Cir. 1985) (citations omitted). What Gonzalez's Rule 60(b)(6) motion alleges, in so many words, is that "an intervening change in

---

[40] The mandate rule and the law of the case doctrine are for our purposes interchangeable. *See Piambino v. Bailey*, 757 F.2d 1112, 1120 (11th Cir. 1985) ("The 'mandate rule,' as it is known, is nothing more than a specific application of the 'law of the case' doctrine."). Thus, in referring to the mandate rule, I am also referring to the law of the case doctrine.

[41] Another way of looking at this situation is to treat the district court's final decision denying Gonzalez's habeas petition as if Gonzalez had not appealed the decision.

the controlling law dictates a different result." I suggest that Rule 60(b) is the perfect vehicle for invoking the intervening-change-in-the-law exception to the mandate rule.[42] In fact, I can think of no other procedural rule that is as tailor made for this situation as Rule 60(b)(6).

In sum, I disagree with the majority's decision that a COA is required to review the district court's refusal to entertain Gonzalez's motion. I also dissent from its disposition, which is that the district court's ruling stands unreviewable. The message the majority is sending to the district judges of this circuit is that they can deny with impunity a Rule 60(b) motion. Can it be that the framers of Rule 60(b) and the rules governing habeas petitions and the Congress that enacted them meant to say that a district court decision not to entertain a petitioner's true Rule 60(b)(6) motion is unreviewable?[43] I think not.

C.

In *Mobley*, the majority grants a COA, reviews the petitioner's collateral motion as if he had filed it under Rule 60(b)(3), finds no merit in the motion, and affirms the district court, which denied the motion because it felt bound by

---

[42] The majority misapprehends this point to mean that any motion asserting an intervening change in the law is a true Rule 60(b) motion if filed as such. As I have explained, § 2244(b)(2)(A) applies to a collateral attack on a habeas petitioner's sentence or conviction, even if that attack rests upon a change in the law. Rule 60(b), on the other hand, should apply free of AEDPA's limitations when a petitioner attacks the integrity of a district court's habeas judgment. As the panel correctly understood, Gonzalez's motion is a true Rule 60(b) motion, not because it asserts a change in the law, but because it "attacks the prior federal court habeas order denying relief from the state court judgment of conviction and sentence, instead of attacking the underlying conviction and sentence judgment itself . . . ." *Gonzalez*, 317 F.3d at 1311.

[43] Had the district court granted Gonzalez the relief he seeks, the State could have appealed the decision without obtaining a COA. *See supra* note 31.

Felker v. Turpin, 101 F.3d 657 (11th Cir. 1996).[44] I disagree with the majority's holding that a Rule 60(b)(3) decision cannot be appealed absent a COA. I agree, however, with the majority—for the reasons stated in my dissent to the panel's opinion, *Mobley*, 306 F.3d at 1097,which the majority appears to adopt—that Mobley's motion fails to state a case under Rule 60(b)(3).[45] I therefore concur in the majority's decision affirming the district court's judgment.[46]

---

[44] The district court read *Felker* as requiring the district courts of this circuit to treat all Rule 60(b) motions as SSHPs. The majority effectively limits this interpretation of *Felker's* holding by omitting Rule 60(b)(3) motions from mandatory SSHP treatment.

[45] I read the majority as perhaps reaching alternative holdings: (1) if reasonable jurists could construe Mobley's motion as having been filed under Rule 60(b)(3), the motion is meritless; (2) if reasonable jurists could construe Mobley's motion as alleging a new constitutional claim, it is an SSHP and fails to meet the criteria of § 2244(b)(2).

[46] I also concur in the court's decision to deny Mobley's motion to recall the mandate in *Mobley v. Head*, No. 00-13980, and Mobley's motion to stay his execution.

BARKETT, Circuit Judge, specially concurring in part and dissenting in part, in which WILSON, Circuit Judge, joins:

I agree completely with Judge Tjoflat's thorough opinion with the exception of his resolution of Mobley's claim. I agree with Judge Tjoflat that the district court denied Mobley's motion on the basis of an improper interpretation of *Felker v. Turpin*, 101 F.3d 657 (11th Cir. 1996). I do not agree, however, that we should nonetheless affirm the court's denial of Mobley's motion because it fails to state a case under Rule 60(b)(3). This Court reviews a denial of a 60(b) motion for abuse of discretion. *See Booker v. Singletary*, 90 F.3d 440, 442 (11th Cir. 1996). Under that standard, where the district court bases its decision on an incorrect interpretation of the law, we are to remand for further proceedings rather than exercise our discretion by affirming the court's denial on other grounds.[1] I do not agree that Mobley fails to state a claim under Rule 60(b)(3). Mobley argues in his motion that recently discovered evidence indicates that the district court's judgment denying his prior habeas petition rests on a defective foundation because the court relied upon facts (regarding district attorney Fuller's prior testimony) that the State knew or should have known were false. In my view, Mobley clearly alleges that although Fuller's misleading

[1] As stated in *Collins v. Seaboard C.R. Co.*,

> A discretionary decision that falls within permitted bounds, but is based on false premises, raises the question on review as to whether the trial court would have come to the same conclusion using proper premises. That it could have does not satisfy the inquiry as to whether it would have reached the same result. The affirmance of a discretionary decision that is based on an improper view of the facts or the law merely reflects the appellate court's exercise of discretion that rightfully belongs to the trial court. The proper role of appellate review permits a remand for further proceedings when a discretionary decision has been made on false premises.

Id., 681 F.2d 1333, 1335 (11th Cir. 1982).

testimony was given in state court, the State's actions regarding Fuller's testimony in federal habeas court created infirmities in that proceeding in addition to the state proceedings. Furthermore, Mobley's motion could be construed to also raise claims under 60(b)(2) ("newly discovered evidence") or 60(b)(6) ("any other reason justifying relief from the operation of the judgment"). Thus, Mobley's claim should be remanded to the district court for resolution on the merits.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

U.S. Const. art. I sec. 9 (Suspension Clause):

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of rebellion or Invasion the public Safety may require it.

U.S. Const. amend. V (Due Process Clause):

No person shall . . . be deprived of life, liberty or property, without due process of law . . .

Fed. R. Civ. P. 60(b):

Rule 60. Relief From Judgment or Order

* * *

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality

of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., §§ 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

28 U.S.C. § 2244 Finality of determination:

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if

proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be

conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

28 U.S.C. § 2254, Rule 11 Federal Rules of Civil Procedure; Extent of Applicability:

The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules.

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996) (excerpts):

PUBLIC LAW 104—132—APR. 24, 1996

* * *

110 STAT. 1214

ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996

* * *

110 STAT. 1217

TITLE I—HABEAS CORPUS REFORM

* * *

110 STAT. 1218

SEC. 103. AMENDMENT OF FEDERAL RULES OF APPELLATE PROCEDURE.

28 USC app.

Rule 22 of the Federal Rules of Appellate Procedure is amended to read as follows:

"Rule 22. Habeas corpus and section 2255 proceedings

"(a) APPLICATION FOR THE ORIGINAL WRIT.—An application for a writ of habeas corpus shall be made to the appropriate district court. If application is made to a circuit judge, the application shall be transferred to the appropriate district court. If an application is made to or transferred to the district court and denied, renewal of the application before a circuit judge shall not be permitted. The applicant may, pursuant to section 2253 of title 28, United States Code, appeal to the appropriate court of appeals from the order of the district court denying the writ.

"(b) CERTIFICATE OF APPEALABILITY.—In a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court, an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of appealability pursuant to section 2253(c) of title 28, United States Code. If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of appealability or state the reasons why such a certificate should not issue. The certificate or the statement shall be forwarded to the court of appeals with the notice of appeal and the file of the proceedings in the district court. If the district judge has denied the certificate, the applicant for the writ may then request issuance of the certificate by a circuit judge. If such a request is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges of the court of appeals. If an appeal is taken by a State or its representative, a certificate of appealability is not required.

* * *

110 STAT. 1220

SEC. 106. LIMITS ON SECOND OR SUCCESSIVE APPLICATIONS.

(a) CONFORMING AMENDMENT TO SECTION 2244(a).—Section 2244(a) of title 28, United States Code, is amended by striking "and the petition" and all that follows through "by such inquiry." and inserting, "except as provided in section 2255."

(b) LIMITS ON SECOND OR SUCCESSIVE APPLICATIONS.—Section 2244(b) of title 28, United States Code, is amended to read as follows:

"(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

"(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

"(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

"(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

"(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

"(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

"(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be deter

mined by a three-judge panel of the court of appeals.

"(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

"(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

"(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

"(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section."

* * *

(4)

Supreme Court, U.S.
FILED
FEB 25 2005
OFFICE OF THE CLERK

No. 04-6432

IN THE

Supreme Court of the United States

AURELIO O. GONZALEZ,
Petitioner,

v.

JAMES V. CROSBY, JR.,
Secretary, Florida Department of Corrections,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF PETITIONER

KATHLEEN M. WILLIAMS
Federal Public Defender
PAUL M. RASHKIND *
Assistant Federal Public Defender
Chief of Appeals
RICHARD C. KLUGH
Assistant Federal Public Defender
Deputy Chief of Appeals
Office of the Federal Public Defender
Southern District of Florida
150 West Flagler Street, Suite 1500
Miami, Florida 33130-1555
(305) 536-6900

* Counsel of Record *Counsel for Petitioner*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals erred in holding that every Rule 60(b) motion (other than for fraud under (b)(3)) constitutes a prohibited "second or successive" petition as a matter of law, in square conflict with decisions of this Court and of other circuits.

INTERESTED PARTIES

There are no parties to this proceeding other than those named in the caption of the case. For the *en banc* proceedings in the Court of Appeals, however, that court consolidated two otherwise unrelated cases with Mr. Gonzalez's appeal, *Stephen A. Mobley vs. Derrick Schofield*, and *Emil Lazo vs. United States of America. See Gonzalez v. Sec'y for Dep't of Corr.*, 366 F.3d 1253 (11th Cir. 2004) (*en banc*), JA-24. This Court denied Mr. Mobley's separate petition for writ of certiorari. *Mobley v. Schofield*, 125 S. Ct. 965 (2005). Mr. Lazo did not seek certiorari review.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
INTERESTED PARTIES	ii
TABLE OF CITED AUTHORITIES	vi
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT	6
ARGUMENT	8
The Court of Appeals Erred in Holding That Every Rule 60(b) Motion (Other than for Fraud Under (b)(3)) Constitutes a Prohibited "Second or Successive" Petition as a Matter of Law, in Square Conflict with Decisions of this Court and of Other Circuits	8
A. Federal Rule of Civil Procedure 60(b) Codifies Legal Grounds and Procedures to Relieve a Party of the Final Judgment in a Civil Action	8
B. Neither the Letter nor the Spirit of AEDPA Overrides the Express Provisions of Rule 60(b)(6)	14
(1) The Letter of AEDPA, As Codified in 28 U.S.C. § 2244(b)(1), Is Silent About Rule 60(b)(6)	14
(2) Repeal by Silence is Disfavored	15

TABLE OF CONTENTS—Continued

Page

C. Contrary to Cardinal Principles of Statutory Construction, the Court of Appeals' Decision Effectively Repeals by Implication Whole Sections of Rule 60(b) 17

(1) A Rule 60(b)(6) Motion is Not a Second or Successive Habeas Petition Subject to the Constraints of 28 U.S.C. § 2244(b)(1)..... 18

(2) Judicial Recharacterization of a True Rule 60(b) Motion to Deprive the Court of Jurisdiction is Impermissible 21

(3) Analogy to the Mandate Recall Decision of *Calderon v. Thompson* is Not Apt 23

(4) Applying 28 U.S.C. § 2244(b)(1)'s Second and Successive Application Bar to Prohibit Rule 60(b)(6) Jurisdiction Is Contrary to the Court's Precedents, Which Carefully Avoid Conflict with the Suspension of the Writ Clause of U.S. Const. art. I sec. 9. and the Fifth Amendment's Due Process Clause..... 25

D. Failing to Heed the Doctrine of Constitutional Avoidance Raises "Grave and Doubtful Constitutional Questions" Concerning Suspension of the Great Writ and Due Process 32

(1) Wholesale Excision of Rule 60(b), Rather than Case-Specific Consideration, Raises Grave Questions About Suspension of the Writ 33

TABLE OF CONTENTS—Continued

Page

(2) Categorical Denial of Rule 60(b) Relief for a Habeas Petitioner Wrongly Denied a Determination of the Claims Asserted Raises Grave Questions of Due Process of Law 36

(3) The Court of Appeals' Holding Raises Grave Constitutional Questions in Mr. Gonzalez's Case..... 38

E. Rule 60(b) Complements and Coexists Peacefully with AEDPA..... 39

(1) Rule 60(b) Complements AEDPA, Serving the Same Ends in Similar Ways..... 40

(2) Rule 60(b) Coexists Peacefully with AEDPA 44

(3) The Functional Approach Followed in the Vast Majority of Circuits is a Straightforward Formulation for District Courts to Follow 46

CONCLUSION..... 48

TABLE OF CITED AUTHORITIES

CASES: Page

Abdur'Rahman v. Bell, 537 U.S. 88(2003)..... 18
Abney v. United States, 431 U.S. 651(1977)..... 37
Ackermann v. United States, 340 U.S. 193(1950)... 11, 23, 44
Agostini v. Felton, 521 U.S. 203(1997) ..... *passim*
Anti-Fascist Committee v. McGrath, 341 U.S. 123(1951)..... 37
Artuz v. Bennett, 531 U.S. 4(2000) ..... *passim*
Atkins v. Virginia, 536 U.S. 334(2002)..... 42, 43
Blackmon v. Money, 531 U.S. 988 (2000) (mem.), *on remand*, 27 Fed. Appx. 543 (6th Cir. 2001) 28
Bloom v. Illinois, 391 U.S. 194(1968) 37
Booker v. Singletary, 90 F.3d 440(11th Cir. 1996) 11
Boone v. Sec'y, Dep't of Corr., 377 F.3d 1315(11th Cir. 2004)..... 17
Boyd v. United States, 304 F.3d 813(8th Cir. 2002) 11, 21
Browder v. Director, 434 U.S. 257(1978) 10
Burkett v. Cunningham, 826 F.2d 1208(3d Cir. 1987) 10
Calderon v. Thompson, 523 U.S. 538(1998) ..... *passim*
Castro v. United States, 540 U.S. 375(2003)..... 21, 22
Cornell v. Nix, 119 F.3d 1329(8th Cir. 1997)..... 12
Corrigan v. Buckley, 271 U.S. 323(1926) 38
Delancy v. Fla. Dep't. of Corr., 246 F.3d 1328(11th Cir. 2001).....3, 14, 39
Devino v. Duncan, 215 F. Supp. 2d 414 (S.D.N.Y. 2002)..... 45
Dunlap v. Litscher, 301 F.3d 873(7th Cir. 2002)... 10, 21
Engle v. Isaac, 456 U.S. 107(1982)..... 33
Evitts v. Lucey, 469 U.S. 387(1984) 37, 38
Ex parte Yerger, 8 Wall. 85, 19 L.Ed. 332(1869)... 27

TABLE OF CITED AUTHORITIES—Continued

Page

Felker v. Turpin, 518 U.S. 651(1996)..... *passim*
Finch v. Vaughn, 67 F.3d 909(11th Cir. 1995)..... 13
Fuentes v. Shevin, 407 U.S. 67(1972)..... 37
Girouard v. United States, 328 U.S. 61(1946) 15
Goldberg v. Kelly, 397 U.S. 254(1970) 37
Gomez v. United States District Court, 503 U.S. 653(1992)..... 10
Gonzalez v. Crosby, 125 S. Ct. 961(2005)..... 6
Gonzalez v. Sec'y for Dep't of Corr., 317 F.3d 1308(11th Cir. 2003) (vacated panel opinion)... 1, 4
326 F.3d 1175 (11th Cir. 2003) (*rehearing en banc* order).....1, 4, 12
366 F.3d 1253 (11th Cir. 2004) (en banc) ..... *passim*
Gonzalez v. State, 692 So.2d 900(Fla. 3d DCA 1997) 2
Guyton v. United States, 23 Fed. Appx. 539(7th Cir. 2001) 28
Hamilton v. Newland, 374 F.3d 822 (9th Cir. 2004), *pet. for cert. filed* (U.S. Nov. 17, 2004) (No. 04-7992)..... 11, 20
Harris v. United States, 536 U.S. 545(2002)..... 25
Harris v. United States, 367 F.3d 74(2d Cir. 2004) 20
Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238(1944)..... 10
Henslee, Collector of Internal Revenue v. Union Planters Nat'l Bank & Trust, 335 U.S. 595 (1949)..... 47
Hess v. Cockrell, 281 F.3d 212(5th Cir.2002)..... 10
INS v. St. Cyr, 533 U.S. 289(2001)..... 16, 33
In re Abdur'Rahman, 392 F.3d 174 (6th Cir. 2004) (*en banc*).....10, 11, 19, 28

TABLE OF CITED AUTHORITIES

	Page
In re Holladay, 331 F.3d 1169(11th Cir. 2003).....	42
In re Morris, 328 F.3d 739(5th Cir. 2003).....	43
In re Campbell, 82 Fed. Appx. 349, 2003 WL 22682129 (5th Cir. 2003).....	43
Klapprott v. United States, 335 U.S. 601(1949)....	*passim*
Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988).....	10
Lindh v. Murphy, 521 U.S. 320 (1997).....	16
Lonchar v. Thomas, 517 U.S. 314(1996).....30, 33, 40	
Mabry v. Johnson, 467 U.S. 504(1984).....	13
Martinez-Villareal v. Stewart, 523 U.S. 637 (1998).....26, 28, 29, 36	
Mobley v. Head, 306 F.3d 1096(11th Cir. 2002) (vacated panel decision).....	18
Morrissey v. Brewer, 408 U.S. 471(1972).....	37
Muniz v. United States, 236 F.3d 122(2d Cir. 2001).....	29
NLRB v. Plasterers' Local Union No. 79, 404 U.S. 116(1971).....	15
O'Neal v. McAninch, 513 U.S. 432(1995).....	45
Plaut v. Spendthrift Farm, 514 U.S. 211(1995).....	9
Pridgen v. Shannon, 380 F.3d 721 (3d Cir. 2004), *pet. for cert. filed* (U.S. Oct. 29, 2004) (No. 04-7060).....	10, 20
Reed v. Champion, 46 F.3d 1152, 1995 WL 4007 (10th Cir. 1995).....	11
Reid v. Angelone, 369 F.3d 363 (4th Cir. 2004)....	10, 20
Reinoso v. Artuz, 1999 WL 335365, 1999 U.S. Dist. LEXIS 7768, No. 97 Civ. 3174 (S.D.N.Y. May 25, 1999).....12, 29, 45	
Ritter v. Smith, 811 F.2d 1398 (11th Cir. 1987)	11

TABLE OF CITED AUTHORITIES

	Page
Robles v. Senkowski, 1999 WL 556854, 1999 U.S. Dist. LEXIS 11565, No. 97 Civ. 2798 (S.D.N.Y. Jul. 30, 1999) 12, 30, 46	
Robison v. Maynard, 958 F.2d 1013 (10th Cir. 1992)	11
Rodriguez v. Mitchell, 252 F.3d 191 (2d Cir. 2001)	10
Rodwell v. Pepe, 324 F.3d 66 (1st Cir. 2003), *cert. denied*, 540 U.S. 873 (2003).....10, 19, 20	
Ross v. Artuz, 150 F.3d 97(2d Cir. 1998).....	30
Sanders v. United States, 373 U.S. 1(1963).....	35
Schlup v. Delo, 513 U.S. 298(1995)	10, 36
Scott v. Singletary, 38 F.3d 1547 (11th Cir. 1994)....	11
Singleton v. Norris, 319 F.3d 1018 (8th Cir. 2003)	43
Slack v. McDaniel, 529 U.S. 473(2000)	*passim*
Smith v. Bennett, 365 U.S. 708(1961).....	33
Tal v. Miller, 1999 WL 38254, 1999 U.S. Dist. LEXIS 652, No. 97 Civ. 2275 (S.D.N.Y. Jan. 27, 1999) 12, 29, 30, 45	
Teague v. Lane, 489 U.S. 288(1989)	45, 47
Thomas v. Roe, 23 Fed. Appx. 847(9th Cir. 2001) ...	28
Thompson v. Calderon, 151 F.3d 918(9th Cir.1998)	21
Townsend v. Burke, 334 U.S. 736(1948)	13
Tyler v. Cain, 533 U.S. 656(2002).....	42
United States v. Ohio Power Co., 353 U.S. 98 (1957).....	8
United States v. Roman, 989 F.2d 1117(11th Cir. 1993)	13
United States v. Tucker, 404 U.S. 443(1972)	13
United States v. United Continental Tuna Corp., 425 U.S. 164(1976).....	15

TABLE OF CITED AUTHORITIES

Page

United States v. Vargas, 393 F.3d 172(DC Cir. 2004) 11
United States v. Weinstock, 340 F.3d 200 (4th Cir. 2003), *cert.denied*, 580 U.S. 995(2003) 10, 20
United States v. Wells, 519 U.S. 482(1997)..... 15
United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U.S. 366(1909)..... 25
Vega v. Artuz, 2002 WL 252764 (S.D.N.Y. Feb. 20, 2002) 45
Vt. Agency of Nat. Res. v. United States ex rel. Stevens, 529 U.S. 765(2000)..... 16, 33
Whitfield v. United States, 125 S. Ct. 687(2005)... 15
Williams v. Chrans, 1994 WL 630598, No. 87 C 2084 (N.D. Ill. Nov. 8, 1994)..... 47
Wilson v. Fenton, 684 F.2d 249(3d Cir. 1982) 12

CONSTITUTIONAL PROVISIONS:

U.S. Const. art. I, sec. 9 ..... *passim*
U.S. Const. art. III, sec. 2..... *passim*
U.S. Const. amend V..... *passim*
U.S. Const. amend XIV 37

STATUTES:

28 U.S.C. § 1254(1) 2
28 U.S.C. § 1291..... 37
28 U.S.C. § 2241..... 27
28 U.S.C. § 2241(b)(1) 31
28 U.S.C. § 2244..... 2
28 U.S.C. § 2244(b) 39, 44, 48
28 U.S.C. § 2244(b)(1) ..... *passim*
28 U.S.C. § 2244(b)(2) ..... *passim*
28 U.S.C. § 2244(b)(3)(E) 27
28 U.S.C. § 2244(d)(1) 3

TABLE OF CITED AUTHORITIES

Page

28 U.S.C. § 2244(d)(1)(C) 41, 42, 43
28 U.S.C. § 2253(c) 25
28 U.S.C. § 2254..... *passim*
28 U.S.C. § 2255.....5, 29, 35
28 U.S.C. §§ 2071-2077 9
28 U.S.C.A. Fed. R. Civ. P. 57-60..... 23
Antiterrorism and Effective Death Penalty Act of 1996 Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996)..... *passim*

RULES:

Fed. R. App. P. 22..... 15
Fed. R. Civ. P. 11..... 10, 16
Fed. R. Civ. P. 59(b) 9
Fed. R. Civ. P. 60.....18, 23, 46
Fed. R. Civ. P. 60(b) ..... *passim*
Advisory Committee Note to 1948 amendment, 5 F.R.D. 433 (1946) 9
Fed. R. Civ. P. 60(b)(3).....4, 17, 21, 30
Fed. R. Civ. P. 60(b)(5)..... 11
Fed. R. Civ. P. 60(b)(6)..... *passim*
Fed. R. Crim. P. 33 22

OTHER AUTHORITIES:

Hertz & Liebman, *Federal Habeas Corpus Practice and Procedure* (4th ed. 2001)..... 34, 35
The Avoidance of Constitutional Questions and the Preservation of Judicial Review: Federal Court Treatment of the New Habeas Provisions, 111 Harv. L. Rev. 1578(April 1998) 25
11 Wright, Miller & Kane,*Federal Practice and Procedure* § 2851(2d ed. 1995) 9, 23, 44

IN THE

Supreme Court of the United States

No. 04-6432

AURELIO O. GONZALEZ,
Petitioner,

v.

JAMES V. CROSBY, JR.,
Secretary, Florida Department of Corrections,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF PETITIONER

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Eleventh Circuit are published, *Gonzalez v. Sec'y for Dep't of Corr.*, 366 F.3d 1253 (11th Cir. 2004) (en banc), JA-22; *Gonzalez v. Sec'y for Dep't of Corr.*, 326 F.3d 1175 (11th Cir. 2003) (order granting rehearing *en banc*); *Gonzalez v. Sec'y for Dep't of Corr.*, 317 F.3d 1308 (11th Cir. 2003) (vacated panel order). The district court's Order Denying Motion to Amend and Closing Case is unpublished, but is set forth in the Joint Appendix, JA-21.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on April 26, 2004. Mr. Gonzalez filed his petition for writ of certiorari on

July 24, 2004, and this Court granted the petition on January 14, 2005. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS INVOLVED

This case involves U.S. Const. art. I sec. 9 (Suspension Clause); U.S. Const. amend. V (Due Process Clause); Federal Rule of Civil Procedure 60(b); Rule 11, Rules Governing Section 2254 Cases; the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996); and 28 U.S.C. § 2244. All are set forth in the Joint Appendix, JA-126-133.

STATEMENT OF THE CASE

Aurelio Gonzalez is a Florida state prisoner serving a 99-year prison sentence for robbery with a firearm. He pleaded guilty to that offense and was sentenced in 1982. *Gonzalez v. Sec'y for Dep't of Corr.*, 366 F.3d 1253, 1261 (11th Cir. 2004) (*en banc*), JA-32[1]; R1:1. He did not file a direct appeal, but in November, 1996, he filed in state court a collateral motion attacking his conviction on grounds of newly discovered evidence which he claimed showed that his guilty plea was unintelligent, unknowing and involuntary. He claimed his guilty plea was induced by false information, a promise he would only serve 13 years of a 99-year sentence. R1:1. The state trial court denied relief in December, 1996. He appealed, but the state appellate court affirmed, *Gonzalez v. State*, 692 So.2d 900 (Fla. 3d DCA 1997) (table); *Gonzalez*, 366 F.3d at 1261, JA-32, denying rehearing on May 8, 1997. R1:5 Ex. L.

[1] The *Gonzalez* decision misstates the year of conviction and sentence as 1992. 366 F.3d at 1261, JA-32.

On June 17, 1997, Mr. Gonzalez filed a *pro se* federal petition for writ of habeas corpus, R1:1, raising the same grounds he asserted in the state court. 366 F.3d at 1261, JA-32. With the federal court's permission, R1:8, and absent objection by the state, he amended his petition on November 12, 1997. R1:9. As amended, the petition sets forth two claims: (1) Mr. Gonzalez's state guilty plea was involuntary because it was induced by untrue information about the relatively short time he would likely serve (13 years) on a 99-year sentence; and (2) Mr. Gonzalez was sentenced based upon an inaccurate criminal history, which included convictions of other persons mistakenly thought to be him. *Id.* Without addressing the merits of these claims, the district court dismissed the petition on September 9, 1998, as untimely and time barred under the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2244(d)(1). 366 F.3d at 1261, JA-32.

Mr. Gonzalez filed a timely *pro se* notice of appeal, JA-[] (Docket Entry 20, dated Sept. 23, 1998), R1:20, but he was denied a certificate of appealability and the appeal was dismissed on April 6, 2000. 366 F.3d at 1261, JA-32.[2]

On November 7, 2000, the United States Supreme Court decided *Artuz v. Bennett*, 531 U.S. 4 (2000), which corrected lower court interpretations of how AEDPA's one-year limitations period is tolled. On April 6, 2001, the Eleventh Circuit Court of Appeals decided *Delancy v. Fla. Dep't of Corr.*, 246 F.3d 1328, 1330 n.2 (11th Cir. 2001), ac-

[2] The district court initially granted a certificate of appealability, R1:23, without setting forth an issue, but the deficient COA was remanded to the district court. R1:25. The district court then denied a COA on December 14, 1999. R1:27. Mr. Gonzalez filed a timely *pro se* notice of appeal on January 12, 2000, R1:28, and on February 11, 2000, the district court granted his motion to proceed on appeal *in forma pauperis*. R1:31. The Court of Appeals then declined to issue a COA and the appeal was dismissed on April 6, 2000. R1:32.

knowledging that *Artuz* changed the Eleventh Circuit law relating to the tolling of AEDPA's limitations period.

On July 30, 2001, Mr. Gonzalez filed a *pro se* Rule 60(b) Motion to Amend or Alter Judgment, seeking relief on the grounds of an intervening change in law, which established that his original habeas corpus petition was erroneously dismissed as time barred. The two intervening decisions cited in the motion are *Artuz v. Bennett*, 531 U.S. 4 (2000) and *Delancy v. Fla. Dep't of Corr.*, 246 F.3d 1328 (11th Cir. 2001). JA-13; R1:33. Without response from the state, the district court entered an Order Denying Motion to Amend and Closing Case, because, "Petitioner has already taken an appeal to the Eleventh Circuit. Accordingly, this Court no longer has jurisdiction over his claims." JA-21, R1:34.

Mr. Gonzalez perfected a timely *pro se* appeal. R1:36. A certificate of appealability was eventually granted.[3]

At the time the *en banc* Court of Appeals ordered the appeal reheard, it also appointed counsel to represent Mr. Gonzalez and consolidated his case with two otherwise unrelated habeas cases—the case of Stephen A. Mobley, who filed a Rule 60(b)(3) motion following a § 2254 proceeding,

[3] The COA took a very circuitous route. The district court denied a COA, R1:38, but a judge of the Court of Appeals granted one as to the following issue: "Whether the district court erred in dismissing appellant's habeas petition, 28 U.S.C. § 2254, as barred by the one-year statute of limitations provision in the Antiterrorism and Effective Death Penalty Act of 1996?" JA-9 (dated Aug. 15, 2002). The COA was vacated by a panel order dated January 10, 2003, and the appeal was then dismissed. *Gonzalez v. Sec'y for Dep't of Corr.*, 317 F.3d 1308 (11th Cir. 2004) (vacated panel order). The panel decision was vacated by the full court, however, in a ruling that also vacated the original circuit judge's COA. *Gonzalez v. Sec'y for Dep't of Corr.*, 326 F.3d 1175 (11th Cir. 2003) (*en banc* order). Finally, in its en banc decision the Court of Appeals granted a certificate of appealability. Gonzalez v. Sec'y for Dep't of Corr., 366 F.3d at 1261 (*en banc*), JA-45-46.

and the case of Emil Lazo, who filed a Rule 60(b)(6) motion following a § 2255 proceeding—for the parties to brief and argue four specific questions common to each of the cases: (1) Is a certificate of appealability required before an appeal may be taken from the denial of a Rule 60(b) motion involving an order or judgment in a § 2254 proceeding? (2) If so, should one issue in this case? (3) What standards or rules should govern Rule 60(b) motions involving an order or judgment in a 28 U.S.C. § 2254 proceeding, i.e., under what circumstances, if any, should such a motion be granted? (4) Was it an abuse of discretion for the district court to deny the Rule 60(b) motion in this case? *Id.* at 1256.[4]

Later, the *en banc* Court of Appeals directed the parties to brief two additional issues that would signal the eventual decision below: (1) Should the general principles of habeas cases and AEDPA "inform" the decision whether Rule 60(b) relief is available post-AEDPA?; and (2) Except in cases of fraud on the federal habeas court, is Rule 60(b) relief available only "to avoid miscarriage of justice as defined by our habeas corpus jurisprudence?" JA-11 (dated June 27, 2003).

On April 26, 2004, the *en banc* Court of Appeals issued its decision. It first determined that a certificate of appealability was required before proceeding on the petitioners' appeals, 366 F.3d at 1263, JA-38, and then granted a certificate of appealability in Gonzalez's appeal on the question, "What standards are applicable to Rule 60(b) in § 2254 cases, and in light of those standards was it an abuse of discretion for the district court to deny the motion?" 366 F.3d at 1268, JA-45-46. The *en banc* Court of Appeals ultimately determined that Gonzalez's Rule 60(b) motion was properly denied because the district court lacked jurisdiction to hear a true Rule

[4] As to Emil Lazo, the questions were couched in terms of § 2255 proceedings.

60(b)(6) motion based on intervening change in law. *Id.* at 1281-82, JA-69-70.

Mr. Gonzalez filed a timely Petition for Writ of Certiorari on July 22, 2004, which the Court granted on January 14, 2005, on the following issue: "Whether the Court of Appeals erred in holding that every rule 60(b) motion (other than for fraud under (b)(3)) constitutes a prohibited "second or successive" petition as a matter of law, in square conflict with decisions of this Court and of other circuits." *Gonzalez v. Crosby*, 125 S. Ct. 961 (2005).

SUMMARY OF ARGUMENT

Rule 60(b) manifests the ideal that injustice should not persist due to a mistaken final judgment. Historically, that Rule has been applied to habeas corpus proceedings, but its application was foreclosed by the Eleventh Circuit Court of Appeals based on a perceived inconsistency between the Rule and provisions of the Antiterrorism and Effective Death Penalty Act of 1996. The categorical decision of the Eleventh Circuit Court of Appeals is contrary to this Court's analytical framework and precedents interpreting AEDPA. It is also in direct conflict with the functional approach to deciding Rule 60(b) claims that has been adopted in the vast majority of circuits.

Decisions of the Court have followed three guiding principles in interpreting AEDPA's procedural requirements. First, Congress will not be deemed to have repealed prior habeas jurisprudence absent a specific statement on the subject. Second, provisions of AEDPA should be interpreted to avoid raising grave constitutional questions. Third, courts should not unilaterally recharacterize a *pro se* motion to be one that is jurisdictionally barred.

The Eleventh Circuit's decision, an outlier by any standard, fails to honor these principles and, as a result, raises grave questions about the suspension of the Great Writ and due process of law in this case and others. Its categorical approach

is rejected by nearly all of the other circuits, which adhere instead to a functional approach to Rule 60(b) motions, examining the substance of each motion to determine if it truly fits the grounds of Rule 60(b), or is instead a disguised successive petition. Although the cases show some 60(b) motions were functionally successive petitions, the cases also reveal 60(b) motions that do fit within the parameters of Rule 60(b) relief. The other circuits and lower courts have sorted these motions with relative ease, dismissing those that are improper and addressing the merits of those that are true.

Remarkably, a side-by-side analysis of Rule 60(b) and key provisions of AEDPA reveals that they complement each other and coexist well. All sections address a common concern, exceptions to the *res judicata* rule in habeas corpus cases, exceptions that Congress has specifically legislated. Indeed, without Rule 60(b), at least one provision of AEDPA would be of questionable constitutionality, so the Rule actually serves to ensure the constitutional validity of the overall statutory scheme. The present case highlights this.

Under the categorical formulation of the Eleventh Circuit, habeas petitioners have no recourse to have their habeas claims reopened, even if those claims were improperly dismissed based upon a mistaken application of a procedural bar. Mr. Gonzalez's case provides a microcosm of erroneous court rulings that together become extraordinary circumstances appropriate for Rule 60(b) relief. He filed a timely federal petition for writ of certiorari, raising grounds of facial merit, challenging his 99-year sentence for robbery. The petition was erroneously dismissed as time barred under the AEDPA, so none of his claims were addressed, considered, or decided on the merits. He perfected an appeal, but his appeal was dismissed because he was erroneously denied a certificate of appealability. Intervening corrective changes in law then occurred, on which Mr. Gonzalez relied in filing a Rule 60(b) motion to reopen the erroneous final judgment.

But the district court refused to consider the motion in the mistaken belief that a prior appeal deprived it of jurisdiction over the claims.

In this case, Rule 60(b) provides the final opportunity to vindicate Mr. Gonzalez's right to have his habeas claims heard on the merits. Without the Rule, his claims can never be addressed or determined, raising grave concerns of whether the statutory scheme, as interpreted in this case, suspends the Great Writ and violates due process of law. Judicious case-by-case application of the Rule avoids any constitutional entanglements. The Court should reject the Eleventh Circuit's categorical rule, in favor of the other circuits' functional approach to Rule 60(b).

ARGUMENT

THE COURT OF APPEALS ERRED IN HOLDING THAT EVERY RULE 60(b) MOTION (OTHER THAN FOR FRAUD UNDER (b)(3)) CONSTITUTES A PROHIBITED "SECOND OR SUCCESSIVE" PETITION AS A MATTER OF LAW, IN SQUARE CONFLICT WITH DECISIONS OF THIS COURT AND OF OTHER CIRCUITS.

A. Federal Rule of Civil Procedure 60(b) Codifies Legal Grounds and Procedures to Relieve a Party of the Final Judgment in a Civil Action.

Federal Rule of Civil Procedure 60(b) authorizes the district courts to relieve a party to a civil action from the force of a final judgment. The Rule embodies the federal courts' inherent authority under Article III of the Constitution to exercise "power over [their] own judgments," *United States v. Ohio Power Co.*, 353 U.S. 98, 99 (1957) (per curiam), including the power to correct those judgments. As such, codification of the Rule did "not provide a new remedy at all," but rather the Rule is "simply the recitation of pre-

existing judicial power." *Plaut v. Spendthrift Farm*, 514 U.S. 211, 234-35 (1995).

Adopted under the Rules Enabling Act, Rule 60(b) carries the weight of law and the imprimatur of both the Court and Congress.[5] The Rule specifies six grounds for relief, including a residuary catchall provision:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence [the party] could not have . . . discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b).

The Rule derives from a "variety of writs and equitable remedies, 'shrouded in ancient lore and mystery.'" 11 Wright, Miller & Kane, *Federal Practice and Procedure* § 2851, at 227 (2d ed. 1995) (quoting Advisory Committee Note to 1948 amendment of Rule 60(b), 5 F.R.D. 433, 479 (1946)). In its final form, after various amendments, Rule 60(b) abolished all of those ancient writs and remedies, replacing them with a single unified motion for relief from a final judgment or order. *Id.* § 2867, at 393-95.

---

[5] "Congress allowed Rule 60(b) to be created through the Rules Enabling Act process, *see generally*, 28 U.S.C. §§ 2071-2077, by not exercising its legislative authority to veto or modify that rule, *see* § 2074." *Gonzalez v. Sec'y for Dep't of Corr.*, 366 F.3d at 1270, JA-49.

"In simple English," the Rule "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Klapprott v. United States*, 335 U.S. 601, 614-15 (1949). It "reflects and confirms the courts' own inherent and discretionary power, 'firmly established in English practice long before the foundation of our Republic,' to set aside a judgment whose enforcement would work inequity.'" *Plaut*, 514 U.S. at 233-24 (quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944)); *see also Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 863-64 (1988).

Rule 11, Rules Governing Section 2254 Cases, applies the Federal Rules of Civil Procedure to habeas corpus proceedings, to the extent appropriate and not inconsistent with the codified habeas rules themselves. In accord with Habeas Rule 11, Federal Rule of Civil Procedure Rule 60(b) has been applied to habeas corpus proceedings.[6] *See Browder v. Director*, 434 U.S. 257, 263 n.8, 272-74 (1978) (majority and concurring opinions assume that Rule 60(b) applies in habeas corpus cases). Virtually every circuit has considered application of the Rule to a wide variety of habeas corpus settings, both before and after the adoption of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214.[7] Such application makes good prac-

[6] Habeas jurisdiction is essentially an equity forum. *See, e.g., Schlup v. Delo*, 513 U.S. 298, 319 (1995); *Gomez v. United States District Court*, 503 U.S. 653, 653-54 (1992).

[7] *See, e.g., Rodwell v. Pepe*, 324 F.3d 66, 70-71 (1st Cir.), *cert. denied* 540 U.S. 873 (2003); *Rodriguez v. Mitchell*, 252 F.3d 191, 198 (2d Cir. 2001); *Pridgen v. Shannon*, 380 F.3d 721, 725 (3d Cir. 2004), *pet. for cert. filed* (U.S. Oct. 29, 2004) (No. 04-7060); *Burkett v. Cunningham*, 826 F.2d 1208 (3d Cir. 1987) (pre-AEDPA); *Reid v. Angelone*, 369 F.3d 363, 375 (4th Cir. 2004); *United States v. Weinstock*, 340 F.3d 200, 206-07 (4th Cir.), *cert. denied*, 540 U.S. 995 (2003); *Hess v. Cockrell*, 281 F.3d 212, 215 (5th Cir. 2002); *In re Abdur'Rahman*, 392 F.3d 174 (6th Cir. 2004) (*en banc*); *Dunlap v. Litscher*, 301 F.3d 873, 876 (7th Cir. 2002); *Boyd v. United States*, 304 F.3d 813, 814 (8th Cir. 2002) (*per curiam*); *Hamilton v. Newland*, 374 F.3d 822 (9th Cir. 2004), *pet. for cert. filed* (U.S. Nov.17, 2004) (No. 04-7992); *Robison v. Maynard*, 958 F.2d 1013, 1017 (10th Cir. 1992) (by implication); *Reed v. Champion*, 46 F.3d 1152 (table), 1995 WL 4007 (10th Cir. 1995) (pre-AEDPA); *Ritter v. Smith*, 811 F.2d 1398 (11th Cir. 1987) (pre-AEDPA); *Scott v. Singletary*, 38 F.3d 1547, 1553-54 (11th Cir. 1994) (pre-AEDPA); *United States v. Vargas*, 393 F.3d 172, 175 (DC Cir. 2004) (by implication).

tical sense since district courts confront a wide variety of circumstances necessitating modifications to their judgments in habeas corpus cases, whether in favor of the state or the petitioner. *See, e.g., Ritter v. Smith*, 811 F.2d 1398 (11th Cir. 1987) (granting state relief under Rule 60(b)(6) due to Supreme Court's intervening change in death penalty jurisprudence); *In re Abdur'Rahman*, 392 F.3d 174 (6th Cir. 2004) (*en banc*) (granting prisoner relief under 60(b)(6) due to intervening change in law of exhaustion). The authority conferred by Rule 60(b) provides essential flexibility to adapt to these circumstances.

Rule 60(b)(6), the "other reasons" residuary clause, covers "all reasons, except the five particularly specified," empowering courts to vacate judgments in the interests of justice. *Klapprott v. United States*, 335 U.S. at 614-15. Included in this category are motions for relief from a judgment where there has been an intervening change in law, coupled with extraordinary circumstances. *Id.; see Ackermann v. United States*, 340 U.S. 193, 199 (1950); *Agostini v. Felton*, 521 U.S. 203 (1997) (applying companion subsection, 60(b)(5), to reopen 12 year-old permanent injunction due to intervening change in law); *In re Abdur'Rahman*, 392 F.3d 174 (applying 60(b)(6) due to intervening clarification of state law on exhaustion); *Ritter v. Smith*, 811 F.2d 1398 (applying 60(b)(6) due to intervening Supreme Court decision); *Booker v. Singletary*, 90 F.3d 440 (11th Cir. 1996) (acknowledging viability of 60(b)(6), but finding neither qualifying change in

law nor extraordinary circumstances); *Wilson v. Fenton*, 684 F.2d 249 (3d Cir. 1982) (acknowledging viability of 60(b)(6) to intervening decision of Supreme Court or Court of Appeals); *Cornell v. Nix*, 119 F.3d 1329, 1332 (8th Cir. 1997) ("'A post-judgment change in the law having retroactive application may . . . constitute an extraordinary circumstance warranting vacation of a judgment' [in a] habeas corpus proceeding."); *Tal v. Miller*, 1999 U.S. Dist. LEXIS 652, No. 97 Civ. 2275, 1999 WL 38254 (S.D.N.Y. Jan. 27, 1999) (granting Rule 60(b)(6) relief to prisoner whose petition was erroneously dismissed as time-barred, based on intervening Court of Appeals decision changing law on computation of one-year grace period); *Reinoso v. Artuz*, 1999 U.S. Dist. LEXIS 7768, No. 97 Civ. 3174, 1999 WL 335365 (S.D.N.Y. May 25, 1999) (same); *Robles v. Senkowski*, 1999 U.S. Dist. LEXIS 11565, No. 97 Civ. 2798, 1999 WL 556854 (S.D.N.Y. Jul. 30, 1999) (same).

As a number of these cases illustrate, Rule 60(b)(6) is commonly used to reopen a habeas corpus case that was terminated without a determination of the petitioner's claims, due to an erroneous interpretation of the procedural requirements of AEDPA, as revealed by a subsequent correction in the interpretation of that statute. This very circumstance is presented here.

Aurelio Gonzalez filed a "true Rule 60(b) motion," 366 F.3d at 1262, JA-34,[8] alleging an intervening change (correction) in the interpretation of the governing law, coupled with exceptional circumstances.[9] Gonzalez had been denied *any* habeas corpus review of his claims, even though he filed a timely petition under 28 U.S.C. § 2254, including two issues meriting habeas corpus relief.[10] He was denied habeas

[8] The *en banc* court reiterated the panel's conclusion on this point:

> The panel characterized Gonzalez's filing as a true Rule 60(b) motion, because it does not assert a new ground for relief from his conviction and sentence, or reassert an old one; instead, the motion is aimed solely at re-opening the judgment that had been entered against Gonzalez in his prior § 2254 proceeding on statute of limitations grounds without regard to the merits of any claims. *Id.* [*Gonzalez v. Sec'y for the Dep't of Corr.*, 317 F.3d 1308] at 1311 [(11th Cir. 2003) (vacated panel opinion)].

Gonzalez, 366 F.3d at 1262, JA-34.

[9] As a practical matter, Rule 60(b)(6) is the only available avenue for reopening consideration of the statute of limitations issue below. The intervening decision on which Mr. Gonzalez relies to show his habeas petition was improperly dismissed as untimely, *Artuz v. Bennett*, 531 U.S. 4 (2000), does not qualify to permit the filing of a second or successive habeas application. *See* 28 U.S.C. § 2244(b)(2). It is not a new claim, does not involve a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court," nor does his claim involve newly discovered facts "sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." *Id.*

[10] Gonzalez "contends that his guilty plea was unintelligent, unknowing, and involuntary based upon specific evidence he has proffered." *Gonzalez*, 366 F.3d at 1268, JA-45. As amended, the petition for writ of habeas corpus sets forth two claims of facial merit: (1) Mr. Gonzalez's state guilty plea was involuntary because it was induced by untrue information about the relatively short time he would likely serve (13 years) on a 99-year sentence. R1:9. Such a claim, if established, supports a writ of habeas corpus. *See Finch v. Vaughn*, 67 F.3d 909 (11th Cir. 1995) (due process requires vacating state defendant's guilty plea, induced by counsel's misadvice about concurrency of sentences, as not voluntary, intelligent and knowing plea). "[W]hen 'the defendant pleads guilty on a false premise' . . . a guilty plea violates the Due Process Clause." Id. at 914 (quoting *Mabry v. Johnson*, 467 U.S. 504, 509 (1984)); (2) Mr. Gonzalez was sentenced based upon an inaccurate criminal history, which included convictions of other persons mistakenly thought to be him. Such an error at sentencing implicates a constitutional due process violation. *Townsend v. Burke*, 334 U.S. 736, 740- 41 (1948) (due process requires that sentence be based only on accurate information); *see United States v. Tucker*, 404 U.S. 443, 447 (1972) (reversal required where "sentence founded at least in part upon misinformation of constitutional magnitude"); *United States v. Roman*, 989 F.2d 1117, 1128 n.25 (11th Cir. 1993) (*en banc*) (defendant has a "due process right to be sentenced based on reliable evidence").

corpus review of his claims due solely to the district court's erroneous computation of the statute of limitations under AEDPA, pre-*Artuz v. Bennett*, 531 U.S. 4 (2000). He was denied appellate review of that error due to the district court's and court of appeals' refusal to issue a certificate of appealability on that question because it did not raise a constitutional issue, a refusal that was based on an erroneous interpretation of AEDPA's COA requirement, pre-*Slack v. McDaniel*, 529 U.S. 473 (2000) (permitting COA for non-constitutional issue resulting from procedural dismissal of habeas petition); *see Delancy v. Fla. Dep't of Corr.*, 246 F.3d at 1330 n.2.

This Court's intervening decisions in *Artuz* and *Slack* make clear that both the district court's dismissal and the Court of Appeals' refusal to grant a COA were wrongly decided. The errors of law combined to deprive Mr. Gonzalez of the habeas review of his claims to which he was entitled under 28 U.S.C. § 2254, effectively depriving him of his first habeas corpus petition. Under these circumstances, Mr. Gonzalez properly sought to reopen his habeas application because he had been erroneously left without any adjudication of the merits of his claims due to an extraordinary confluence of errors of law.

B. Neither the Letter nor the Spirit of AEDPA Overrides the Express Provisions of Rule 60(b)(6).

(1) The Letter of AEDPA, As Codified in 28 U.S.C. § 2244(b)(1), Is Silent About Rule 60(b)(6).

This much is clear and indisputable: The Antiterrorism and Effective Death Penalty Act of 1996 says not one word about Rule 60(b) or its use in habeas corpus proceedings. Neither does any of the legislative history published in connection with the law. This is true even though: Rule 60(b) was in effect and in use for over a half-century by the time AEDPA was adopted; the Rule's application to habeas corpus proceedings was well developed in the law, *see supra* at

10-11 & n.7; and it is presumed that Congress legislates with knowledge of existing case law governing the subject. *See Whitfield v. United States*, ___ U.S. ___, 125 S. Ct. 687, 688 (2005) (Congress is presumed to have knowledge of existing law when enacting relevant legislation). The presumption is confirmed since Congress demonstrated its awareness of existing rules by choosing to amend one, while specifically not amending others.

> Tellingly, Congress was not blind to the effects AEDPA would have on the rules of procedure; for example, focusing on the relevant Federal Rules of Appellate Procedure, Congress amended Federal Rule of Appellate Procedure 22. *See* AEDPA of 1996, Pub. L. No. 104-132, 110 Stat. 1214 § 103. Congress did nothing, however, to Rule 60(b); rather, it simply let the Rule stand as is.

Gonzalez, 366 F.3d at 1303 n.30 (Tjoflat, J., specially concurring in part and dissenting in part, Barkett, Wilson, JJ., joining), JA-111. These circumstances invoke recognized rules of statutory construction that do not permit congressional silence to repeal existing legislation.

(2) Repeal by Silence is Disfavored.

The Court has stated repeatedly that congressional silence is not a proper ingredient for a new rule of law that effectively counters existing law. When confronted with "at most legislative silence on the crucial statutory language," the Court has "frequently cautioned that '[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law.'" *United States v. Wells*, 519 U.S. 482, 496 (1997), citing *NLRB v. Plasterers' Local Union No. 79*, 404 U.S. 116, 129-130 (1971) (quoting *Girouard v. United States*, 328 U.S. 61, 69 (1946)). It is, therefore, "a cardinal principle of statutory construction that repeals by implication are not favored," *United States v. United Con-*

tinental Tuna Corp., 425 U.S. 164, 168 (1976), a principle that "carries special weight when [the Court is] urged to find that a specific statute has been repealed by a more general one." *Id.* at 169.

Consistent with Habeas Rule 11, the specific statute of Rule 60(b) was applied in habeas corpus cases before AEDPA was adopted. *See supra* at 10-11 & n.7. The only change in law that might have altered such application was the adoption of AEDPA, a general statute that is completely silent on the question. Repeal by implication is, therefore, inappropriate, and especially so because Rule 60(b) embodies the federal courts' inherent power under the Constitution to correct erroneous and inequitable judgments.

Moreover, the suggestion that Congress implicitly restricted that power in habeas cases would raise substantial constitutional questions, implicating the Suspension of the Writ and Due Process clauses. *See* subsection D., *infra* at 32-39. Under the doctrine of constitutional avoidance, *see, e.g., INS v. St. Cyr*, 533 U.S. 289, 299-304 (2001); *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 787 (2000), AEDPA could not properly be construed as imposing such a restriction in the absence of an explicit and clear statement to that effect. And of course AEDPA contains no such statement, explicit or otherwise.

The Court has observed the difficulty of understanding precisely what Congress wrote in AEDPA. "[I]n a world of silk purses and pigs' ears, the Act is not a silk purse of the art of statutory drafting." *Lindh v. Murphy*, 521 U.S. 320, 336 (1997). Attempting to interpret a statute's silence when its written words are obtuse is that much more treacherous. Accepted principles of statutory construction militate against a finding that AEDPA's silence repealed much of Rule 60(b) in habeas corpus proceedings.

C. Contrary to Cardinal Principles of Statutory Construction, the Court of Appeals' Decision Effectively Repeals by Implication Whole Sections of Rule 60(b).

Although AEDPA makes no reference to Rule 60(b) and expresses no limitations on its use in habeas corpus proceedings, the *en banc* Eleventh Circuit Court of Appeals nevertheless created a bright line prohibition on the use of all of Rule 60(b) in such cases (except fraud under 60(b)(3)).[11] Unable to identify an explicit congressional countermand of the previously adopted Rule 60(b), the Court of Appeals instead constructed its own premise and conclusion—"[the] central purpose of the AEDPA and its provisions specifically restricting the filing of second or successive petitions severely limit the application of Rule 60(b) to habeas cases," 366 F.3d at 1269, JA-[]—then attempted to support it by assembling other rules and laws that also say nothing about Rule 60(b). Implicitly acknowledging the shaky foundation for its conclusion, the Court of Appeals informed its viewpoint by misapplying as supporting precedent the Court's unrelated and inapposite decision in *Calderon v. Thompson*, 523 U.S. 538 (1998). After redefining a Rule 60(b)(6) motion to be something it is not—a second or successive habeas petition ("SSHP")—the Court of Appeals then held that the newly recharacterized motion is prohibited by the second and successive petition bar of 28 U.S.C. § 2244(b)(1), as amended by AEDPA.

---

[11] That *Gonzalez* is a bright line rule was confirmed three months later when a panel of the Eleventh Circuit Court of Appeals relied on the *en banc* decision to *sua sponte* dismiss another habeas corpus case based on the jurisdictional bar erected in the *en banc* decision. *Boone v. Sec'y, Dep't of Corr.*, 377 F.3d 1315 (11th Cir. 2004) (on rehearing granted) ("Sitting *en banc*, our Court . . . held that district courts do not have the jurisdiction to consider Rule 60(b) motions to reconsider the denial of a habeas petition unless the motion is a 60(b)(3) motion, that is, one made to prevent fraud upon the court.").

As explained more fully below, the Court of Appeals' holding mischaracterizes Rule 60(b) motions as SSHP's; is inconsistent with the analytical framework used by this Court in post-judgment review of habeas corpus cases denied or dismissed on procedural grounds; improperly applies this Court's decision in *Calderon v. Thompson*; and, by failing to heed the doctrine of constitutional avoidance, raises grave questions about violating both the Suspension of the Writ Clause of U.S. Const. art. I sec. 9 and the Due Process Clause of the Fifth Amendment.

(1) A Rule 60(b)(6) Motion is Not a Second or Successive Habeas Petition Subject to the Constraints of 28 U.S.C. § 2244(b)(1).

A Rule 60(b) motion is not a second or successive habeas petition ("SSHP"). "[T]he difference is explained by the relief that the applicant seeks." *Abdur'Rahman v. Bell*, 537 U.S. 88, 94 (2003) (STEVENS, J., dissenting from dismissal of certiorari as improvidently granted). "[A] motion for relief under Rule 60 of the Federal Rules of Civil Procedure contests the integrity of the proceeding that resulted in the district court's judgment . . . . [A] rule 60(b) motion is designed to cure procedural violations in an earlier proceeding—here, a habeas corpus proceeding—that raise questions about that proceeding's integrity." *Abdur'Rahman v. Bell*, 537 U.S. at 95 (STEVENS, J., dissenting) (quoting *Mobley v. Head*, 306 F.3d 1096 (11th Cir. 2002) (Tjoflat, J., dissenting) (vacated panel opinion)). But,

> [l]ike the ancient procedures it replaced, Rule 60(b) was never intended to permit parties to relitigate the merits of claims or defenses, or to raise new claims or defenses that could have been asserted during the litigation of the case. Rather, the aim of Rule 60(b) was to allow a district court to grant relief when its judgment rests upon a defective foundation.

> As applied in the habeas context, the "factual predicate [of a Rule 60(b) motion] deals primarily with some irregularity or procedural defect in the procurement of the judgment denying habeas relief." *Rodwell v. Pepe*, 324 F.3d 66, 70 (1st Cir. 2003).

366 F.3d at 1291-92 (Tjoflat, J., specially concurring in part and dissenting in part, Barkett, Wilson, JJ., joining), JA-89-90.

"An SSHP," in contrast, "is a different species[; l]ike a first petition for a writ of habeas corpus, an SSHP is a collateral attack upon the applicant's conviction or sentence." *Gonzalez*, 366 F.3d at 1292 (Tjoflat, J., specially concurring in part and dissenting in part, Barkett, Wilson, JJ., joining), JA-90.

Put another way, a Rule 60(b) motion in a § 2254 case is designed to remedy unfairness in the *federal habeas* proceedings; it does not address directly the underlying *state court* proceedings that are otherwise the subject of the habeas lawsuit. A proper Rule 60(b) motion in a § 2254 case thus involves allegations that the federal court judgment was tainted because of some error infecting proceedings held in a federal court lawsuit, the subject of which is alleged unfairness in a state court criminal trial. *See Rodwell v. Pepe*, 324 F.3d at 70 (Rule 60(b) motion "attacks only the manner in which the earlier habeas judgment has been procured").

The Sixth Circuit found this distinction meaningful when it recently abandoned allegiance to the Eleventh Circuit's bright line prohibition of Rule 60(b)(6) motions. "[T]he rigid approach, adopted by the Eleventh Circuit and the dissent here, prohibits too much. It fails to appreciate both the significant functional differences between Rule 60(b) motions and habeas petitions and that those differences mean that many Rule 60(b) motions will not run afoul of AEDPA." *In re Abdur'Rahman*, 392 F.3d at 179.

Other circuits found this distinction vital, as well. One week after the Eleventh Circuit's *Gonzalez* ruling, the Second Circuit

rejected the Eleventh Circuit's approach and reiterated its contrary view in *Harris v. United States*, 367 F.3d 74, 79 & n.3 (2d Cir. 2004) ("since the Rule 60(b)[6] motion arguably attacks the integrity of Harris's habeas proceeding, we must consider its merits"). Two weeks later, the Fourth Circuit also rejected the Eleventh Circuit's bright line rule, holding instead that a true Rule 60(b)(6) motion is jurisdictionally cognizable: "[A] motion seeking a remedy for some defect in the collateral review process will generally be deemed a proper motion to consider." *Reid v. Angelone*, 369 F.3d 363, 375 (4th Cir. 2004) (vacating order denying mixed Rule 60(b) motion including both successive and true issues, permitting petitioner to elect to proceed only on true 60(b)(6) issue). And, for like reasons, the Ninth Circuit refused to apply a bright line rule forbidding habeas petitioners to utilize Rule 60(b)(6), holding instead that a "district court should have treated [a habeas petitioner's] motion solely as a 60(b)(6) motion and not as a second or successive petition under . . . 'AEDPA'[]." *Hamilton v. Newland*, 374 F.3d at 823.

As the majority of circuits have held, given that a Rule 60(b) motion is not a SSHP, 28 U.S.C. § 2244(b)(1) simply does not apply to restrict filings under the Rule.[12] Cir-

[12] *Rodwell v. Pepe*, 324 F.3d at 70-71 (1st Cir.) (holding that Rule 60(b) motion is available when it "deals primarily with some irregularity or procedural defect" of the habeas proceeding itself); *Harris v. United States*, 367 F.3d at 79 & n.3 (2d Cir.) ("since the Rule 60(b) motion arguably attacks the integrity of Harris's habeas proceeding, we must consider its merits"); *Pridgen v. Shannon*, 380 F.3d at 725 (3rd Cir.) (holding that where factual predicate of Rule 60(b) motion attacks manner in which earlier habeas judgment was procured, it is not successive and is cognizable); *Reid v. Angelone*, 369 F.3d at 375 (4th Cir.) (vacating order denying mixed Rule 60(b) motion including both successive and true issues, permitting petitioner to elect to proceed only on true 60(b)(6) issue); *United States v. Weinstock*, 340 F.3d at 206-07 (4th Cir.) (holding that not all Rule 60(b) motions are successive applications; each case should be analyzed based on the nature of the claims presented); *Hess v. Cockrell*, 281 F.3d at 215 (5th Cir.) (taking a dim view of using a Rule 60(b) motion to set aside the denial of habeas, but expressly declining to decide whether such Rule 60(b) motions are always successive habeas petitions); *In re Abdur'Rahman*, 392 F.3d 174 (6th Cir.) (en banc) (expressly rejecting categorical approach of *Gonzalez* in favor of functional case-by-case analysis); *Dunlap v. Litscher*, 301 F.3d at 876 (7th Cir.) (allowing Rule 60(b) motion to reopen previous habeas case as long as the substance of the motion does not pertain to "territory occupied by AEDPA"); *Boyd v. United States*, 304 F.3d at 814 (8th Cir.) (per curiam) (directing district courts to conduct "a brief initial inquiry to determine whether the allegations in the Rule 60(b) motion in fact amount to a second or successive collateral attack" in which case the motion should be denied as barred or transferred to the court of appeals for certification); *Hamilton v. Newland*, 374 F.3d 822 (9th Cir.) (holding district court should have treated habeas petitioner's motion solely as a 60(b)(6) motion and not as a second or successive petition under AEDPA); *Thompson v. Calderon*, 151 F.3d at 921 & n.3 (9th Cir.) (en banc) (holding that a Rule 60(b) motion ordinarily "should be treated as a successive habeas petition," but declining to adopt "a bright line rule equating all Rule 60(b) motions with successive habeas petitions").

cumventing this conclusion, the Eleventh Circuit decided that all Rule 60(b) motions (other than those brought under 60(b)(3)) are the functional equivalent of SSHP's, recharacterized the Rule 60(b)(6) motion below as an SSHP, and then applied 28 U.S.C. § 2244(b)(1) to jurisdictionally bar the recharacterized motions. This reasoning suffers from a number of interpretational infirmities and ignores the doctrine of constitutional avoidance, thereby raising grave questions about two discrete constitutional violations.

(2) Judicial Recharacterization of a True Rule 60(b) Motion to Deprive the Court of Jurisdiction is Impermissible.

The Court has recently reversed a judicial attempt to recharacterize a *pro se* prisoner filing to the detriment of the prisoner. In *Castro v. United States*, 540 U.S. 375 (2003), this Court reversed a decision of the Eleventh Circuit that permitted involuntary recharacterization of a prisoner's motion

for new trial, filed pursuant to Federal Rule of Criminal Procedure 33, as a habeas petition, thereby rendering it a second and successive petition barred by AEDPA. The gravamen of the Court's decision is that (1) federal courts should not "stretch the [jurisdiction limiting] words of the [habeas corpus] statute too far," jurisdictionally closing federal court doors to habeas petitioners seeking review "without any clear indication that such was Congress' intent," 540 U.S. at 380; and (2) federal courts may not recharacterize a pleading to the detriment of a *pro se* litigant with the effect of depriving the court of jurisdiction to hear the claim (subject to limitations not applicable in this case). *Id.*[13] Castro's holding strongly suggests that a court may not unilaterally recharacterize a Rule 60(b) motion in a habeas corpus case to be a second or successive petition over which the court would then not have jurisdiction. *Castro* also militates against informing a decision in this case contrary to the terms of Rule 60(b), in a way that effectively deprives the court of jurisdiction to hear the merits of the Rule 60(b) matter.

[13] Although two justices concurred separately, the Court ruled unanimously in Parts I and II of the decision, which are summarized above. The only disagreement was about the authority for *any* judicial recharacterization at all, in which "a court deliberately [] override[s] the *pro se* litigant's choice of procedural vehicle for his claim." 540 U.S. at 386 (SCALIA, J., concurring in part and concurring in the judgment, THOMAS, J. joining). A majority of the Court held that *pro se* habeas pleadings may be recharacterized only if the court first gives notice to the litigant of the negative consequences of recharacterization and an opportunity to amend or withdraw the recharacterized pleading; Justice Scalia opined that "pleadings should *never* be recharacterized . . . ." *Id.* at 385. The Court's decision is unanimous, however, that federal courts may not unilaterally recharacterize a pleading to the detriment of a *pro se* litigant, especially if it effectively deprives the court of jurisdiction to hear the claim.

(3) Analogy to the Mandate Recall Decision of *Calderon v. Thompson* is Not Apt.

In the face of the plain language of Rule 60(b) and the silence of Congress in AEDPA, the Eleventh Circuit set forth an unwarranted analogy to *Calderon v. Thompson*, 523 U.S. 538, thereby replacing Rule 60(b)'s specific provisions for relief with *Calderon*'s miscarriage of justice standard for the recall of an appellate mandate. *Calderon* is both procedurally and substantively distinct, making it an inappropriate source to support the Court of Appeals' holding and newly created standard of relief. As Chief Judge Edmondson noted in his separate opinion below: "The Supreme Court's decision in *Calderon* . . . does not control the present cases . . . [because] *Calderon* . . . did not deal with Rule 60 and was not governed by AEDPA . . . . [E]xtending *Calderon*—an inherent-judicial-powers case in which the Supreme Court acted not only as interpreter of laws, but also as supervisor of lower courts—is [n]either necessary [n]or proper . . . ." 366 F.3d at 1286 (Edmondson, C.J., specially concurring in part and dissenting in part), JA-79. These distinctions are highlighted by comparing Rule 60(b) with the mandate-recall events of *Calderon*.

Rule 60(b) has six grounds for relief, fortified with an extensive body of jurisprudence. *See generally* 11 Wright, et al., *Federal Practice and Procedure* §§ 2851-2873; 28 U.S.C.A. Fed. R. Civ. P. 57-60. The rule derives from the common-law and inherent powers of a court, 366 F.3d at 1289-91 (Tjoflat, J., specially concurring in part and dissenting in part, Barkett, Wilson, JJ., joining), JA-[], but was codified in a rule-making process involving the Supreme Court and Congress. 366 F.3d at 1270, JA-84-88. According to the Rule and the many cases interpreting it, Rule 60(b) relief is granted in the discretion of the district court, based upon one of the enumerated grounds, *id.; see Klapprott v. United States*, 335 U.S. 601, and, in the case of 60(b)(6), exceptional circumstances. *Ackermann v. United States*, 340 U.S. at 199.

In contrast, the authority of an appellate court to recall its mandate is debatable, *Calderon*, 523 U.S. at 549, and is not codified by statute or rule. To the extent it is recognized at all, it is a remedy "of last resort, held in reserve against grave, unforseen contingencies." *Id.* Due to a paucity of rules or jurisprudence of its own, the standards for recalling an appellate mandate must necessarily be informed by other rules and law. *Id.*

Calderon involved the propriety of an appellate court recalling its mandate to "revisit the merits of its earlier decision" for a prisoner who "already had extensive review of his claims in federal and state courts." 523 U.S. at 557. Thompson's "extensive review" included litigation on the merits of his claims in at least six separate proceedings, and a plenary appeal of a merits decision based on a federal habeas corpus evidentiary hearing. 523 U.S. 545-46.

Mr. Gonzalez, on the other hand, has never had a hearing, in state or federal court; has never had an evidentiary hearing, in state or federal court; had his first federal habeas petition erroneously dismissed without consideration of the merits of his claims; and was denied an appeal of that error by the restrictions of AEDPA and a misinterpretation of the COA requirement by the lower courts, pre-*Slack v. McDaniel*.

The vehicle by which Thompson sought relief, recall of a mandate, is rarely exercised by appellate courts, the authority for the process is questionable, and there are neither rules, statutes, nor a body of jurisprudence by which to judge its use. This Court was compelled, therefore, to inform its decision by analogous jurisprudence. In contrast, Mr. Gonzalez's remedy of choice is a common legal procedure, the authority for which is recognized by a congressionally adopted rule of procedure and a rich body of jurisprudence. Determining the proper application of Rule 60(b) can be accomplished through the explicit words of the rule and its own jurisprudence, so resort to analogy is unnecessary.

Moreover, resort to the analogy of *Calderon* conflicts with the established principles of Rule 60(b), as well as the Court's analytical approach to habeas corpus proceedings that have been terminated on procedural grounds, without determination of the merits of a petitioner's claims.

(4) Applying 28 U.S.C. § 2244(b)(1)'s Second and Successive Application Bar to Prohibit Rule 60(b)(6) Jurisdiction Is Contrary to the Court's Precedents, Which Carefully Avoid Conflict with the Suspension of the Writ Clause of U.S. Const. art. I sec. 9. and the Fifth Amendment's Due Process Clause.

Unlike the reasoned, balanced and case-specific functional approach adopted by the majority of circuits, the Eleventh Circuit's wholesale excision of Rule 60(b) in habeas corpus cases crashes headlong into difficult issues of constitutional law, contrary to the Court's precedents.

When a literal reading of AEDPA would collide with the Constitution, the Court has read the language differently, or seized upon congressional silence or AEDPA's incorporated habeas corpus jurisprudence, to avoid the collision.[14] This result follows from the Court's doctrine of constitutional avoidance—"[W]hen a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *Harris v. United States*, 536 U.S. 545, 555 (2002) (quoting *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909)). Three illustrations of this analytical

---

[14] *See generally* Note, *The Avoidance of Constitutional Questions and the Preservation of Judicial Review: Federal Court Treatment of the New Habeas Provisions*, 111 Harv. L. Rev. 1578 (April 1998) (summarizing the courts' consistent interpretation of the AEDPA to avoid constitutional difficulties).

approach are *Slack v. McDaniel*, 529 U.S. 473, *Felker v. Turpin*, 518 U.S. 651 (1996), and *Martinez-Villareal v. Stewart*, 523 U.S. 637 (1998).

In *Slack*, the Court refused to allow the specific language of AEDPA—§ 2253(c)'s requirement that a "COA may issue only if the applicant has made a substantial showing of the denial of a constitutional right"—to prevent appeal of a dismissal based on purely procedural grounds. 529 U.S. at 474. The state in *Slack* pointed to apparently-plain language of AEDPA, but the Court rejected that approach, balancing AEDPA's harsh result against the importance of correctly decided habeas corpus proceedings:

> According to the State, only constitutional rulings may be appealed. Under this view, a state prisoner who can demonstrate he was convicted in violation of the Constitution and who can demonstrate that the district court was wrong to dismiss the petition on procedural grounds would be denied relief. We reject this interpretation. The writ of habeas corpus plays a vital role in protecting constitutional rights. In setting forth the preconditions for issuance of a COA under § 2253(c), Congress expressed no intention to allow trial court procedural error to bar vindication of substantial constitutional rights on appeal. . . . Our conclusion follows from AEDPA's present provisions, which incorporate earlier habeas corpus principles.

529 U.S. at 483. Where the apparent requirement of AEDPA would lead to an unconstitutional result, the Court looked instead to the earlier habeas corpus jurisprudence incorporated in the statute. Faced with a constitutional collision between AEDPA and a prisoner's right of habeas review, the Court chose to avoid it by interpreting the statute's limits to fit within what the Constitution permits, allowing a COA for procedural dismissals, without the need to demonstrate an appellate issue of constitutional dimension. In holding that the new petition was not second or successive because the

original dismissal was procedural (not on the merits), a significant consideration was that "[n]o claim made in Slack's 1991 petition was adjudicated during the three months it was pending in federal court." 529 U.S. at 488.

This same approach guided the Court's decision in *Felker v. Turpin*. Rather than interpret AEDPA's apparently-plain language prohibiting Supreme Court jurisdiction to violate the Exceptions Clause of Art. III, § 2, or the Suspension Clause of Art. I, § 9 of the Constitution, the Court read the law to "not preclude this Court from entertaining an application for habeas corpus relief . . . thereby obviat[ing] any claim by petitioner under the Exceptions Clause ... and ... the Suspension Clause. . . ." 518 U.S. 654. The Court's decision relied upon congressional silence about the fate of prior habeas corpus jurisprudence, not to repeal prior law, but rather as indicia that prior law remains intact, despite an express statutory directive:

> [W]e conclude that Title I of the Act has not repealed our authority to entertain original habeas petitions, for reasons similar to those stated in *[Ex parte] Yerger*, 8 Wall. 85, 19 L.Ed. 332 (1869). No provision of Title I mentions our authority to entertain original habeas petitions; in contrast, § 103 amends the Federal Rules of Appellate Procedure to bar consideration of original habeas petitions in the courts of appeals. Although § 2244(b)(3)(E) precludes us from reviewing, by appeal or petition for certiorari, a judgment on an application for leave to file a second habeas petition in district court, it makes no mention of our authority to hear habeas petitions filed as original matters in this Court. As we declined to find a repeal of § 14 of the Judiciary Act of 1789 as applied to this Court by implication then, we decline to find a similar repeal of § 2241 of Title 28—its descendant–by implication now.

518 U.S. 660-61 (footnotes omitted). As in *Slack*, *Felker* avoided constitutional collision by refusing to read into

AEDPA prohibitions that the Constitution would likely not tolerate.

Similarly, in *Martinez-Villareal v. Stewart*, 523 U.S. 637 (1998), the Court refused to construe a second habeas petition as being second or successive even though the ground raised—competency to be executed—had been raised in the original petition. Rather than read the second and successive ban literally, at the expense of a first habeas corpus ruling on the issue (implicating constitutional concerns), the Court instead seized upon the fact that the district court never ruled on the merits of the original claim. 523 U.S. at 645. This allowed the Court to find that the second filing was not successive and permitted the claim to be heard, despite the apparent statutory prohibition. *Id.*

Interpreting AEDPA to fit within the Constitution, rather than interpreting it at an unconstitutional face value, has been the Court's accepted approach. And it is this analytical framework on which a majority of circuits have relied in determining the continuing viability of Rule 60(b)(6). To this end, Rule 60(b) motions relying on *new* legal developments that reveal *pre-existing* law with which a habeas judgment arguably conflicts have been consistently treated as non-successive. *Blackmon v. Money*, 531 U.S. 988 (2000) (mem.), *on remand*, 27 Fed. Appx. 543 (6th Cir. 2001) (denial of 60(b) motion for relief from unappealed, with-prejudice, dismissal as untimely is remanded for reconsideration in light of *Artuz v. Bennett*, construing AEDPA's statute of limitations in a way that could make Blackmon's dismissed petition timely); *In re Abdur'Rahman*, 392 F.3d at 179 (permitting Rule 60(b)(6) motion based on intervening correction on law of exhaustion); *Thomas v. Roe*, 23 Fed. Appx. 847 (9th Cir. 2001) (granting 60(b) relief from unappealed, with-prejudice, dismissal of habeas petition after *Artuz* revealed that dismissing the petition as untimely was arguably in error); *see Guyton v. United States*, 23 Fed. Appx. 539, 540 (7th Cir. 2001) (dicta) (Rule 60(b) motion may be used to reopen a with-prejudice dismissal, as untimely, of a 2255 motion that clearly was timely under recent cases applying the "prison mailbox rule" to federal prisoners).

More than simply providing an analytical approach, *Slack*, *Felker*, and *Martinez-Villarel* are binding precedent. In accord with these precedents, the Second Circuit effectively rebutted the reasoning supporting the Eleventh Circuit's bright line formulation. In *Muniz v. United States*, 236 F.3d 122 (2d Cir. 2001), the prisoner filed a timely § 2255 application within one year of AEDPA's effective date, but more than a year after his conviction became final. His petition was incorrectly dismissed as untimely. Before his appellate rights expired, the Second Circuit decided two cases that construed a grace period within AEDPA's time limitation, which would have made Muniz's application timely. But Muniz's COA was denied and his out-of-time appeal was dismissed. The Second Circuit held that Muniz's subsequent 2255 petition (raising the new cases on timeliness) was not a "second or successive" application. The Court of Appeals noted that "constitutional implications" preclude application of the AEDPA's second or successive provisions in cases where the initial application was erroneously dismissed due to judicial error. *Muniz v. United States*, 236 F.3d at 127-29. "Because 'a dismissal of a first habeas petition for technical procedural reasons would bar the petitioner from ever obtaining federal habeas review,' excusing a prior petition from 'counting' as a first petition in such cases avoids serious constitutional questions arising under the Suspension Clause." *Id.* (quoting *Martinez-Villareal v. Stewart*, 523 U.S. at 645).

Lower federal courts have also followed the precedent of this Court's analytical formulation. For example, district courts in *Tal v. Miller*, 1999 U.S. Dist. LEXIS 652 (S.D.N.Y. Jan 27, 1999), *Reinoso v. Artuz*, 1999 U.S. Dist. LEXIS 7768

(S.D.N.Y. May 25, 1999), and *Robles v. Senkowsi*, 1999 U.S. Dist. LEXIS 11565 (S.D.N.Y. Jul. 30, 1999), granted Rule 60(b) motions to reopen habeas corpus proceedings that had been dismissed based upon an incorrect reading of the tolling and grace period allowed by AEDPA. The decisions are well-conceived, grounding 60(b) relief upon the precedent of this Court and the Second Circuit:

> [A] procedural dismissal "of a first habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty. . . . Given the importance of a first federal habeas petition, it is particularly important that any rule that would deprive inmates of all access to the Writ should be both clear and fair." [*Ross v. Artuz*, 150 F.3d 97, 100 (2d Cir. 1998)] (quoting *Lonchar v. Thomas*, 517 U.S. 314 (1996)).

Tal, 1999 U.S. Dist. LEXIS 652 at *9 (alternative citations omitted). Indeed, the Court's decision in *Lonchar* holds specifically that *ad hoc* variance from the law, rules and precedents governing habeas corpus constitutes error, even if based upon equitable principles, particularly where, as here, dismissal of a *first* habeas petition is at issue. 517 U.S. at 1299. To adopt the Eleventh Circuit's view is to necessarily reject this Court's precedents, including its holding and reasoning in *Lonchar*, permitting *ad hoc* equities to override the written rules governing habeas practice.

Overlooking congressional silence on Rule 60(b), and failing to acknowledge the Court's analytical approach in interpreting AEDPA, or the plain-language distinction between a Rule 60(b) motion and a habeas application, the Eleventh Circuit held that AEDPA repealed virtually all of Rule 60(b) for use by a prisoner in a habeas corpus case, claiming that prisoners' Rule 60(b) motions (other than 60(b)(3)) are necessarily "second or successive," prohibited

by AEDPA, as codified in 28 U.S.C. § 2241(b)(1). The fact that the Eleventh Circuit's holding is based on judicial fiat rather than congressional legislation is pointedly revealed in Chief Judge Edmondson's separate opinion: "[F]ederal judges are not the rightful makers of policy in this sphere. And we cannot properly favor what is convenient over what is true." *Gonzalez*, 366 F.3d at 386 (Edmondson, C.J., specially concurring in part and dissenting in part), JA-79. Chief Judge Edmondson's observation is confirmed by the competing rule formulations of Judge Carnes (for the majority) and Judge Tjoflat (for the dissenters). *Compare Gonzalez*, 366 F.3d at 1279-80 (Carnes, J.) *with* 366 F.3d at 1287 (Tjoflat, J., specially concurring in part and dissenting in part, Barkett and Wilson, JJ., joining), JA-67-68, 81, 99-100. One thing is certain: Congress did not write one whit about limiting Rule 60(b), even though the Rule had been in effect and in use for over a half-century by the time AEDPA was adopted. Congress' only rule is written in Rule 60(b), while the Eleventh Circuit's decision constitutes *ad hoc* judicial rule-making, built of implication from silence.

Rather than an analogy to *Calderon*, the posture of Mr. Gonzalez's case suggests that the better decision for analogy is *Slack v. McDaniel*, in which this Court carved out special considerations for habeas cases reaching a court of appeals after a dismissal on procedural grounds. Recognizing that the alternative left petitioners without habeas review or an appeal of that decision, the Court treated procedurally dismissed cases to a special rule, designed to ensure appellate review even where no constitutional appellate issue is present. It did not adopt the harsh miscarriage of justice approach of *Calderon*, but rather it recognized that procedurally dismissed cases have never had a merits determination of the petitioner's claims in which miscarriage of justice could be demonstrated. Weighing the importance of the Writ's role in ensuring justice under the Constitution against potential abolition of that process for procedurally dismissed cases, the

Court opted in favor of a less demanding, not more demanding, standard.

It is implausible that Congress intended this major overhaul, deleting five of the six paragraphs of Rule 60(b), without ever saying a word on the subject. It is equally implausible that this Court's precedents—which take pains to ensure that erroneous habeas corpus procedural decisions will remain open to review (even if lacking issues of constitutional dimension)—are to be ignored in favor of a more restrictive miscarriage of justice jurisprudence.

The Court avoids the Suspension of the Writ and Due Process implications of 2244(b)(1) by overruling the Eleventh Circuit's decision. If, however, the Eleventh Circuit decision stands—unilaterally recharacterizing Mr. Gonzalez's Rule 60(b) motion as an SSHP barred under all circumstances by 28 U.S.C. § 2244(b)(1)—substantial questions regarding the constitutionality of 2244(b)(1)'s complete *res judicata* bar would arise.

D. Failing to Heed the Doctrine of Constitutional Avoidance Raises "Grave and Doubtful Constitutional Questions" Concerning Suspension of the Great Writ and Due Process.[15]

The Eleventh Circuit's formulation of a categorical rule raises "grave and doubtful constitutional questions" concerning suspension of the Great Writ in violation of U.S. Const. art. I sec. 9 and, in a separate context, denial of Due Process of Law in violation of the Fifth Amendment. This is, of course, a particularly serious matter that arises when a first habeas proceeding is dismissed without a ruling on the

[15] The substance of Question One, on which certiorari has been granted, includes both the Suspension of the Writ and Due Process issues. *Pet. for Writ* at 19-22, 29. The same principles were also addressed in a different context in Question Two, on which certiorari was not granted.

petition's claims. *Lonchar v. Thomas*, 517 U.S. at 324. To protect the continuing viability of the Great Writ, the Court cautioned in *Lonchar*, lower courts are bound to follow the established law, and are "not authorize[d] . . . to ignore this body of statutes, rules and precedents." The Eleventh Circuit's decision fails to heed this caution or the doctrine of constitutional avoidance.

(1) Wholesale Excision of Rule 60(b), Rather than Case-Specific Consideration, Raises Grave Questions About Suspension of the Writ.

Article I, section 9 of the U.S. Constitution provides that, "The Privilege of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it." This Court has said repeatedly that "[t]he writ of habeas corpus indisputably holds an honored position in our jurisprudence" and remains "a bulwark against convictions that violate 'fundamental fairness.'" *Engle v. Isaac*, 456 U.S. 107, 126 (1982). *See, e.g., Slack*, 529 U.S. at 483; *Smith v. Bennett*, 365 U.S. 708, 712 (1961).

Significant questions arise about whether Mr. Gonzalez's right to the Great Writ has been suspended. Certainly he has been deprived of any ruling on the merits of a timely filed first petition. To the extent AEDPA means what the Eleventh Circuit says it does, the law would violate the Suspension of the Writ clause, a result that must not occur under the doctrine of constitutional avoidance. *See INS v. St. Cyr*, 533 U.S. at 299-304; *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. at 787. This constitutional question becomes clear by examining the historical role of successive claims and the change the Eleventh Circuit held was effected by AEDPA.

Prior to the enactment of AEDPA, a state prisoner could file a same-claim second or successive federal habeas corpus petition (*i.e.*, one raising a claim presented and denied in a

prior habeas corpus petition) where the "'ends of justice' would be served by addressing a claim on the merits," because a manifest injustice would result if petitioner was not permitted to relitigate a claim. Hertz & Liebman, *Federal Habeas Corpus Practice and Procedure* § 28.4, at 1324-25 (4th ed. 2001). AEDPA "drastically revised prior law" by imposing a "blanket ban on successive litigation, codified in 28 U.S.C. § 2244(b)(1): 'A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.'" *Id.* Although this Court has upheld AEDPA's restrictions on *new-claim* successive petitions (§ 2244(b)(2)), "the constitutionality of AEDPA's blanket ban on *same-claim* petitions [(§ 2244(b)(1)] is less certain." *Id.* (emphasis added). The reasons given by the Court for upholding § 2244(b)(2) simply do not apply to the blanket ban of § 2244(b)(1).

Felker v. Turpin, 518 U.S. 651 (1996), upheld the new-claim successive petition restrictions imposed by 28 U.S.C. § 2244(b)(2), which limited new-claim successive petitions to those involving enumerated exceptional circumstances. Hertz & Liebman, *Federal Habeas Corpus Practice and Procedure* § 28.4(a), at 1326. Although AEDPA "'further restricted the availability of' such petitions, the Court ruled, it did so via provisions that were 'well within the compass' of 'the complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions.'" Hertz & Liebman, *supra* § 28.4(a), at 1326 (quoting *Felker*, 518 U.S. at 664).

Subsection (2) of § 2244(b) is to be contrasted with the blanket prohibition of same-claim successive petitions—an absolute *res judicata* bar—imposed by § 2244(b)(1). Subsection (b)(1) contains this absolute and completely unforgiving blanket ban on every same-claim SSHP:

> A claim presented in a second or successive habeas corpus application under 2254 that was presented in a prior application shall be dismissed.

28 U.S.C. § 2244(b)(1). Period. No exceptions. Not even if the district court failed to rule on the claim. Not even if the refusal to rule was erroneous as a matter of law. Commentators have called into question whether 2244(b)(1) therefore suspends the Writ in a way never addressed in *Felker*:

> Because (1) section 2244(b)(1) does *not* simply "further[] restrict" new-claim successive petitions, but, instead, forbids them under all circumstances, (2) because doing so works a literal suspension of the writ for such cases, and (3) doing so moves qualitatively *beyond* "the compass" of preexisting "equitable principles . . . [,] historical usage, statutory developments, and judicial decisions," the same-claim provision poses a serious constitutional issue that *Felker* did not resolve.

Hertz & Liebman, *supra* § 28.4(a), at 1326. The Hertz & Liebman treatise's caution is enhanced by this Court's reluctance to apply strict rules of *res judicata* in habeas corpus cases:

> [T]he Court has adhered to the principle that habeas corpus is, at its core, an equitable remedy. This Court has consistently relied on the equitable nature of habeas corpus to preclude strict rules of *res judicata*. Thus, for example, in *Sanders v. United States*, 373 U.S. 1 (1963), this Court held that a habeas court must adjudicate even a successive habeas claim when required to do so by the "ends of justice." *Id.*, at 15-17. The *Sanders* Court applied this equitable principle even to petitions brought under 28 U.S.C. § 2255, though the language of § 2255

contained no reference to an "ends of justice" inquiry. 373 U.S. at 12-15.

Schlup v. Delo, 513 U.S. 298 (1995) (alternate citations omitted).

The Eleventh Circuit's categorical rule prohibiting any Rule 60(b)(6) jurisdiction below—inferring as applicable § 2244(b)(1)'s blanket prohibition of same-claim habeas petitions—raises grave questions about whether its interpretation suspends the Writ in violation of the Constitution. Such a result would be constitutionally unacceptable, and for that precise reason, should trigger the Court's doctrine of constitutional avoidance. As this Court demonstrated in *Slack, Felker, and Martinez-Villareal*, the proper course is to interpret AEDPA to avoid the unconstitutional result, incorporating instead "earlier habeas principles" that allow the law and Constitution to coexist.[16]

(2) Categorical Denial of Rule 60(b) Relief for a Habeas Petitioner Wrongly Denied a Determination of the Claims Asserted Raises Grave Questions of Due Process of Law.

Grave due process questions also arise from the Eleventh Circuit's formulation. A habeas petitioner, such as Mr. Gonzalez, has a statutory right to a single federal habeas corpus review of his state imprisonment. 28 U.S.C. § 2254. Denial of that right may violate the Fifth Amendment's assurance of due process of law.

[16] Alternatively, if the doctrine of constitutional avoidance cannot avoid the conflict, the Court must address the constitutionality of § 2244(b)(1). In such case, we submit, the Court should hold that subsection (b)(1) is so far removed from the direction of the compass of preexisting equitable principles, historical usage, statutory developments, and judicial decisions, that it suspends the Great Writ in violation of the Constitution.

The right of federal habeas corpus is effected by statute, created by Congress, beginning with the Judiciary Act of 1789. The statutory right is subject to the constitutional dictates of the Due Process Clause.[17] *Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 165 (1951) (Frankfurter, J., concurring) (recognizing principle in "full gamut" of cases involving "property and liberty"); *see, e.g., Evitts v. Lucey*, 469 U.S. 387 (1984) (denial of statutory entitlement to direct appeal subject to due process); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (denial of statutory entitlement to be considered for discretionary parole subject to due process); *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970) (denial of statutory entitlement to welfare benefits subject to due process); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (denial of property under prejudgment replevin statute subject to due process). It matters not that the proceeding derives from a statute, as opposed to a constitutionally-mandated procedure. Due process inheres in statutory rights, as well.[18]

Congress has conferred by statute the right of a criminal defendant to a direct appeal. 28 U.S.C. § 1291. Congress has conferred by another statute, 28 U.S.C. § 2254, the right of a state prisoner to a single habeas corpus proceeding in federal court. Both rights protect liberty, ensuring that claims of

[17] Due process of law is guaranteed by both the Fifth and Fourteenth Amendments. Although the latter is only applied to the states, due process has identical meanings under both amendments. *See Bloom v. Illinois*, 391 U.S. 194, 195 (1968) (applying due process protection to contempt proceedings: "The Fifth and Fourteenth Amendments forbid both the Federal Government and the States from depriving any person of 'life liberty, or property, without due process of law.").

[18] Although habeas corpus also has constitutional derivations, U.S. Const. art. I sec. 9 (Suspension Clause), the right to appeal a criminal conviction is purely statutory, not based on a constitutional right. *Abney v. United States*, 431 U.S. 651, 656 (1977). In this sense, due process in a federal habeas corpus proceeding is at least as compelling as it is in a direct appeal.

unjust imprisonment are heard and decided. Both rights have time limitations within which they must be perfected. Yet, if properly perfected, neither proceeding can be negated without due process of law. As with the parallel statutory right of appeal, the statutory right to habeas corpus "would be unique among state actions if it could be withdrawn without consideration of applicable due process norms" for "when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution–and, in particular, in accord with the Due Process Clause." *Evitts*, 469 U.S. 400-01 (internal citations omitted).

To terminate a habeas corpus proceeding arbitrarily and erroneously, without determination of the petitioner's claims —then to deny jurisdiction to reconsider that error based on a clear intervening corrective decision—raises grave constitutional questions of due process of law. *Cf. Corrigan v. Buckley*, 271 U.S. 323, 331 (1926) (by implication) (due process not violated because "defendants were given a full hearing . . . ; they were not denied any constitutional or statutory right; and there is no semblance of ground for any contention that the decrees were so plainly arbitrary and contrary to law as to be acts of mere spoliation").

(3) The Court of Appeals' Holding Raises Grave Constitutional Questions in Mr. Gonzalez's Case.

Mr. Gonzalez complied with the statutory requisites for filing a timely federal habeas corpus petition under 28 U.S.C. § 2254, raising meritorious claims that constitute grounds for granting of the Writ. *See supra* at 13, n.10. His timely habeas corpus petition was improperly terminated by the district court, which misconstrued and miscalculated AEDPA's limitations period, without any ruling on his claims. He was deprived of any appeal of that error due to the court of appeals' erroneous construction of AEDPA's gatekeeping

certificate of appealability requirement (decided pre-*Slack*, when the Eleventh Circuit Court of Appeals still required a constitutional issue for issuance of a COA, even for procedural dismissals). *See Delancy v. Fla. Dep't of Corr.*, 246 F.3d at 1330 n.2.

The confluence of AEDPA legislation and erroneous court rulings deprived Mr. Gonzalez of habeas review to which he was entitled and appellate review to correct that error, ultimately effecting an arbitrary and complete denial of the statutory right of habeas corpus review, suspending the Writ, and denying the most basic precepts of due process. Once this Court decided *Artuz v. Bennett*, correcting the legal interpretation of the previously misconstrued AEDPA limitations period, Rule 60(b)(6) was the only available procedural device to prevent injustice and remedy the due process violation.[19] Permitting another provision of AEDPA—or the spirit of AEDPA—to effectively repeal, *sub silentio*, Rule 60(b)(6) jurisdiction again suspends the Writ and denies due process of law, something the Court's precedents have taken care to avoid.

E. Rule 60(b) Complements and Coexists Peacefully with AEDPA.

The premise of the Eleventh Circuit's decision is that "[t]he discretion to reopen final judgments contemplated in most provisions of Rule 60(b) cannot co-exist in a habeas case with § 2244(b)." 366 F.3d at 1271, JA-[]. To the contrary, Rule 60(b) and AEDPA complement each other and coexist peacefully. Indeed, a part of AEDPA depends for its constitutionality on a vibrant Rule 60(b) in habeas corpus cases.

---

[19] *See* note 9, *supra*.

Section 2244(b)(1)'s absolute ban on SSHP's in 2254 proceedings, as amended by AEDPA[20], is far beyond the compass of preexisting equitable principles, historical usage, statutory developments, and judicial decisions. *See* Hertz, et. al, *supra* § 28.4, at 1324-25. Its novelty is at cross-currents with the inertia of history and the Court's precedents. *Id.* The bold absoluteness of the ban calls into question whether it suspends the Great Writ. *Id.* This is especially problematic where, as here, a first habeas petition is dismissed improperly without a ruling on the prisoner's claims. *Lonchar*, 517 U.S. at 324. Under the Court's doctrine of constitutional avoidance, 2244(b)(1) should be interpreted in a manner that sustains its constitutionality, if possible. A robust Rule 60(b) serves that end.

(1) Rule 60(b) Complements AEDPA, Serving the Same Ends in Similar Ways.

Rule 60(b) and AEDPA are complementary. Rule 60(b) accomplishes in a narrow sense precisely what AEDPA legislated more broadly—a set of rules for when *res judicata* may yield in order to correct an injustice. In 28 U.S.C. § 2244(b)(2), as amended by AEDPA, for example, Congress has authorized a variety of events that trigger a prisoner's right to have a *new claim* heard in a second or successive habeas petition. Such a new claim is based, by statute, on qualifying changes of law or facts.[21] Such developments have

[20] 28 U.S.C. § 2244(b)(1) provides: "A claim presented in a second or successive habeas corpus application under 2254 that was presented in a prior application shall be dismissed."

[21] 28 U.S.C. § 2244(b)(2) permits the filing of a second or successive habeas application if a claim was not presented in a previous application and:

> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(I) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

no temporal limits and the terms of AEDPA authorize new habeas claims and hearings in perpetuity, for as long new legal or factual developments occur. Congress plainly legislated AEDPA with a view that habeas judgments would not be absolutely *res judicata*, recognizing that justice might demand otherwise, and that the events triggering new proceedings could occur at any time after an original habeas judgment.

Rule 60(b) serves similar interests but in a less invasive way since it does not authorize a *new petition* or *new claim* at all. Rather, it simply authorizes a habeas court to reopen the *original* habeas judgment to revisit the *original claim* based on one of the grounds enumerated in Rule 60(b). Unlike 2244(b)(2), which has no temporal limits, a Rule 60(b) motion must be made "within a reasonable time" and for motions based on the grounds contained in subsections (1)-(3), the filing must be within the year after judgment is entered. Rule 60(b) parallels 2244(b)(2), with a more narrow application. The Rule comports with congressional intent that habeas judgments could be revisited.

The thrust of Rule 60(b) is to prevent the continuation of an unjust result based upon an otherwise final judgment, that, due to new developments, is now wrong. *See Agostini v. Felton*, 521 U.S. at 239 (relief appropriate where permanent injunction rests on legal principle that can no longer be sustained). It allows a court to relieve a litigant of a judgment that otherwise has a continuing significant impact for a significant duration. *Id.* Sections 2244(b)(2) and 2244(d)(1)(C) serve that same end, allowing the opening or reopening of

habeas corpus proceedings based on qualifying changes in law or fact.

Unless a district court retains its traditional authority under Rule 60(b)(6), the plain language of AEDPA could result in inexplicable anomalies. Consider a single illustration based upon the Court's decision three Terms ago in *Atkins v. Virginia*, 536 U.S. 334 (2002), holding that the execution of mentally retarded criminals is cruel and unusual punishment prohibited by the Eighth Amendment. *Atkins* has been made retroactive by the Court to cases on collateral review.[22] By any standard of AEDPA the decision should be applicable to all qualifying mentally retarded death row inmates. Without the assistance of Rule 60(b)(6), however, application of *Atkins* to mentally retarded death row prisoners would be disparate and inequitable.

Those on death row who never filed a habeas petition had a new year after *Atkins* to file a petition with an *Atkins* claim. *See* 28 U.S.C. § 2244(d)(1)(C) (limitation period commences on "the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review").

Those on death row who previously filed a habeas petition that overlooked the Eighth Amendment issue were entitled to file a second or successive petition raising the *Atkins* claim, in accordance with 28 U.S.C. § 2244(b)(2) ("A claim presented in a second or successive habeas corpus application under section 2254 *that was not presented in a prior application* shall be dismissed unless—(A) the applicant shows that the

[22] *See In re Holladay*, 331 F.3d 1169, 1172 (11th Cir. 2003) (holding *Atkins* has been held retroactive by the Supreme Court based on reasoning in Justice O'CONNOR's concurrence in *Tyler v. Cain*, 533 U.S. 656, 668 (2002), that a decision can be made retroactive by application of a series of Supreme Court holdings that logically dictate that result).

claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable . . . .") (emphasis added).

Neither 2244(d)(1)(C) nor 2244(b)(2) apply, however, to diligent death row prisoners who previously filed a timely habeas petition including a claim for the right later recognized in *Atkins*, but were unsuccessful, and whose judgment became final. Those diligent prisoners do not qualify for relief because 2244(d)(1)(C) applies only to those who have not previously filed a habeas petition, and § 2244(b)(2) restricts permission for such a claim to one "that was not presented in a prior application." *See In re Morris*, 328 F.3d 739, 740 (5th Cir. 2003) (successful movant under *Atkins* must show proposed claims in successive petition "have not previously been presented in any prior application"); *In re Campbell*, 82 Fed. Appx. 349, 2003 WL 22682129 (5th Cir. 2003)(same); *see Singleton v. Norris*, 319 F.3d 1018, 1027 (8th Cir. 2003) (Loken, J., dissenting) (observing that § 2244(b)(2) relief is for claims "not previously presented"). Left out of relief by 2244(b)(2), diligent death row inmates fit squarely within the absolute bar of 2244(b)(1): "A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." Those inmates, who were mentally retarded when they committed the crime for which they were sentenced to death, could be executed.

Of the three categories of death row inmates, only the diligent ones are unable to benefit from *Atkins*' constitutional holding. This bizarre and likely unconstitutional outcome is completely unavoidable if Rule 60(b)(6) is held to be silently superseded by AEDPA. Rule 60(b)(6) saves the rationality and likely the constitutionality of AEDPA by permitting a district court to exercise its discretion to apply the intervening (corrective) change of law under *Atkins* as a basis to reopen the final judgment and apply the decision, as appropriate. In

that way, rather than being "[o]ne of the most popular vehicles used in the attempted end-runs" around AEDPA, as the Eleventh Circuit describes Rule 60(b), *Gonzalez*, 366 F.3d at 1256, JA-24, the Rule is an important and vital complement to 2244(b).

(2) Rule 60(b) Coexists Peacefully with AEDPA.

This is not to say that Rule 60(b) is an open door to arbitrary reopening of final judgments in habeas corpus cases. The Rule is to be used only in rare cases and the limited record of successful motions supports that. One treatise observes:

> The cases show that although the courts have sought to accomplish justice, they have administered Rule 60(b) with a scrupulous regard for finality. Thus, they have held that a motion must be made within a "reasonable time" . . . . They have prevented the needless protraction of litigation by requiring the party to show a good claim or defense. . . . Relief will not be given if substantial rights of the moving party have not been harmed by the judgment.

11 Wright, et al., *supra* § 2857, at 260-62 (footnotes and citations omitted). This chariness has been applied especially in the case of Rule 60(b)(6) motions. Although this subsection allows relief for intervening changes in law, *Klapprott*, 335 U.S. at 614-15, coupled with extraordinary circumstances, *Ackermann*, 340 U.S. at 199, this hardly means that every intervening change in law justifies reopening every final habeas judgment. To the contrary, "[i]ntervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6) . . . ." *Agostini v. Felton*, 521 U.S. at 239.[23]

---

[23] In the context of intervening legal developments, the *Agostini* Court also observed that application of Rule 60(b) is constrained by the doctrine of *Teague v. Lane*, 489 U.S. 288 (1989) ("new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced"). *Agostini*, 521 U.S. at 239. But the *Teague* doctrine is inapplicable here, since the intervening change in law, *Artuz v. Bennett*, 531 U.S. 4, relates to the federal habeas corpus proceeding itself, not to the underlying state court criminal prosecution. *See Teague*, 489 U.S. at 305, 311 (addressing retroactivity of new rules for the conduct of "criminal prosecutions" and the reliability of findings of guilt in original state court proceedings); *see, e.g., O'Neal v. McAninch*, 513 U.S. 432 (1995) (applying clarification of rules for deciding habeas corpus cases when evidence is in equipoise).

In part for this reason, comparatively few Rule 60(b)(6) motions have been granted in habeas corpus cases, post-AEDPA. Although AEDPA itself caused an initial flurry of threshold circuit decisions about the cognizability of 60(b) motions and the need for a COA to appeal adverse decisions, the number of successful 60(b)(6) motions is paltry. Only one category—which arises rarely—has been commonly applied in the habeas corpus setting and that is the circumstance presented here: The underlying proceeding was terminated without reaching the merits, but an intervening decision demonstrates that it was done based on a misinterpretation of the procedural requirements of the habeas corpus law. Thus, for example, the very few reported cases reveal that relief has been granted where there are extraordinary circumstances coupled with intervening changes in the law of exhaustion, *Devino v. Duncan*, 215 F. Supp. 2d 414 (S.D.N.Y. 2002) (granting 60(b)(6) motion reinstating dismissed first petition due to intervening Supreme Court decision), or the law regarding the statute of limitations. *Vega v. Artuz* 2002 WL 252764 (S.D.N.Y. Feb. 20, 2002) (granting 60(b)(6) motion but ultimately denying relief on the merits); *Tal v. Miller*, 1999 U.S. Dist. LEXIS 652 (granting Rule 60(b)(6) relief to reopen first petition erroneously dismissed as time-barred, based on intervening Court of Appeals decision changing law on computation of one-year grace period); *Reinoso v. Artuz*,

1999 U.S. Dist. LEXIS 7768 (same); *Robles v. Senkowski*, 1999 U.S. Dist. LEXIS 11565 (same). As these cases reveal, extraordinary circumstances occur where the original termination misconstrued the law, effectively resulting in a denial of a first Writ. These cases mirror the circumstances of Mr. Gonzalez's case.

(3) The Functional Approach Followed in the Vast Majority of Circuits is a Straightforward Formulation for District Courts to Follow.

The Eleventh Circuit's categorical bright line rule against Rule 60(b) jurisdiction has been rejected by every other circuit, save one. And for good reason. As Chief Judge Edmondson observed in his separate opinion, the Eleventh Circuit's categorical approach is a "sharp-edged formulation . . . of Rule 60," 366 F.3d at 1286, JA-79, which dispenses with case-by-case analysis: "It might be easier because this approach seems to require less deliberate study of the pertinent motion—study to determine accurately not just the name of the pertinent motion, but the function of the motion . . . ." *Id.* Yet, the functional approach adopted by the vast majority of circuits rejects the Eleventh Circuit's "categorical" and "rigid" approach precisely because it prohibits too much, not even allowing the judge to study the 60(b) motion to see if it covers permissible ground that "will not run afoul of AEDPA." *Abdur'Rahman*, 392 F.3d at 179.

The functional approach is not complex nor unduly burdensome. It requires the district judge to study the motion to determine if it is a proper Rule 60(b)(6) motion, or if it is an SSHP in disguise. *See, e.g., supra* at 13 n.10. In the latter case, the motion is simply dismissed. *Id.*

In the case of a proper motion, such as Mr. Gonzalez's, 366 F.3d at 1262, JA-34, the district judge then decides if it was filed within a reasonable time, and if so, if there exist the kinds of extraordinary circumstances that permit exercising

judicial discretion to reopen the judgment. *See, e.g.*, decisions cited *supra* at 28-30, 45-46.

Where the motion is brought based on an intervening change in law, as under Rule 60(b)(6), a threshold determination must be made about the application of the doctrine of *Teague v. Lane*, 489 U.S. 238. *See Agostini*, 521 U.S. at 239. If the question is *Teague*-barred, the motion is simply denied. *Id.; see, e.g., Williams v. Chrans*, 1994 WL 630598, No. 87 C 2084 (N.D. Ill. Nov. 8, 1994) (denying 60(b) motion because underlying issue is barred by the *Teague* doctrine). If the issue is not *Teague*-barred, then the district court considers whether the intervening change in law impacts the continuing validity of the final habeas judgment and whether extraordinary circumstances exist for granting the motion.

The extraordinary circumstances a case presents will be, in most instances, fact specific. They include, for example, whether a first petition was decided on the merits and if refusal to reconsider the claim leads to continuing injustice that cannot be justified under current law. *Cf. Agostini*, 521 U.S. 238-39. Extraordinary circumstances include, as here, that the petitioner's habeas claims have facial merit, were never determined on the merits, and that continued enforcement of the judgment of imprisonment for an additional extended term is unjust. Mr. Gonzalez meets all three considerations, especially the last one, because there are 76 years remaining on his 99-year sentence of imprisonment.

* * *

Fifty-five years ago Justice Frankfurter paused to reflect on jurisprudential fallibility: "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." *Henslee, Collector of Internal Revenue v. Union Planters Nat'l Bank & Trust*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting). It is fitting that these words are

recorded in the *United States Reports* on the page immediately preceding the decision in *Klapprott v. United States*, 335 U.S. 601, the Court's seminal Rule 60(b)(6) case. Congress seemingly understood the fallibility of habeas review, adopting AEDPA against a backdrop that included Rule 60(b), and specifically adding other exceptions to *res judicata* of habeas judgments. Giving full effect to this statutory scheme, including both § 2244(b) and Rule 60(b), fulfills the intent of Congress and the requirements of the Constitution.

CONCLUSION

Based upon the foregoing brief, the Court should reverse the decision of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

KATHLEEN M. WILLIAMS
Federal Public Defender
PAUL M. RASHKIND *
Assistant Federal Public Defender
Chief of Appeals
RICHARD C. KLUGH
Assistant Federal Public Defender
Deputy Chief of Appeals
Office of the Federal Public Defender
Southern District of Florida
150 West Flagler Street, Suite 1500
Miami, Florida 33130-1555
(305) 536-6900

* Counsel of Record

Counsel for Petitioner

Miami, Florida
February 25, 2005

(12)

No. 04-6432

MAR 3 1 2005

IN THE
SUPREME COURT OF THE UNITED STATES

AURELIO O. GONZALEZ, *Petitioner,*

vs.

JAMES V. CROSBY, *Respondent.*

On Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF ON THE MERITS

CHARLES J. CRIST, JR.
Attorney General of Florida
CHRISTOPHER M. KISE
Solicitor General of Florida

CAROLYN SNURKOWSKI
Assistant Deputy Attorney General
CASSANDRA DOLGIN*
Assistant Attorney General
**Counsel of Record*

OFFICE OF THE ATTORNEY GENERAL
PL-01, The Capitol
Tallahassee, Florida 32399
(850) 414-3300

QUESTION PRESENTED

I. Whether a Rule 60(b)(6) motion seeking to relitigate the final disposition of a federal habeas petition as time-barred constitutes a prohibited "second or successive" petition under 28 U.S.C. § 2244(b)(1)? (Restated).

TABLE OF CONTENTS

Page(s)

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS 2

STATEMENT OF THE CASE 2

State Court Proceedings 2

District Court and Eleventh Circuit Panel Proceedings 3

En Banc Eleventh Circuit Proceedings 6

SUMMARY OF ARGUMENT 9

ARGUMENT

A MOTION FILED PURSUANT TO RULE 60(b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE SEEKING TO RELITIGATE THE DISMISSAL OF A HABEAS PETITION AS TIME-BARRED CONSTITUTES A PROHIBITED "SECOND OR SUCCESSIVE" PETITION UNDER 28 U.S.C. § 2244(b)(1) 11

I. Wholesale application of Rule 60(b) contravenes federal habeas corpus reform under the Anti-Terrorism and Effective Death Penalty Act (1996) (AEDPA), specifically 28 U.S.C. § 2244(b) as amended 12

A. Congress intended to narrow the scope and availability of habeas corpus review with the passage of AEDPA 12

B. Rule 60(b), on the other hand, expansively permits review of final civil judgments, contradictory of the principles underlying AEDPA and this Court's habeas jurisprudence 16

C. Rule 81(a)(2) of the Federal Rules of Civil Procedure and Rule 11 of the Rules Governing Section 2254 Cases mandate the limited applicability of Rule 60(b) in habeas cases 26

II. A Rule 60(b) motion challenging the non-technical procedural denial of habeas corpus relief seeks review of the merits of the adjudication 33

A. Denial of a petition for writ of habeas corpus as time-barred, unlike, for example, a dismissal for lack of exhaustion, a premature claim, or failure to properly complete the requisite habeas form, is not a technical defect but constitutes a judgment on the merits 33

B. A Rule 60(b) motion seeking review of the denial of habeas corpus relief on a non-technical procedural basis is the functional equivalent of a successive petition, barred under § 2244(b)(1) 37

III. A subsequent interpretation by this Court of the procedural rule upon which a lower court denied a habeas petition does not impinge the integrity of that lower court's judgment 39

IV. Retroactive application of a newly announced interpretation of a habeas procedural statute elevates the import of habeas procedure beyond that of new rules of constitutional law attendant to criminal procedure 42

CONCLUSION 47

TABLE OF AUTHORITIES

Federal Cases

Abel v. Tinsley,
338 F.2d 514 (10th Cir. 1964) 39

Abela v. Martin,
348 F.3d 164 (6th Cir. 2003) (en banc),
cert. denied, 124 S.Ct. 2388 (2004) 44

Abdur'Rahman v. Bell,
537 U.S. 88 (2002) 24

Adams v. United States,
155 F.3d 582 (2nd Cir. 1998) 27

Agostini v. Felton,
521 U.S. 203 (1997) 21

Allen v. Mitchell,
276 F.3d 183 (4th Cir. 2001) 44

Alley v. Bell,
392 F.3d 822 (6th Cir. 2004) 22

Artuz v. Bennett,
531 U.S. 4 (2000) 5, 40, 43

Atkins v. Virginia,
536 U.S. 334 (2002) 23

Barefoot v. Estelle,
463 U.S. 880 (1983) 16

Barnes v. Bailey,
43 Fed. Appx. 969 (7th Cir. Jul. 10, 2002)
(unpublished) 33-34

Bates v. Whitley,
19 F.3d 1066 (5th Cir. 1994) 36

Batson v. Kentucky,
476 U.S. 79 (1986) 24

Blackmon v. Armontrout,
61 Fed. Appx. 985 (8th Cir. Mar. 12, 2003)
(unpublished), cert. denied, 540 U.S. 846 (2003) 20-21

Blackmon v. Money,
27 Fed. Appx. 543 (6th Cir. Dec. 10, 2001)
(unpublished) 36

Blair v. Armontrout,
976 F.2d 1130 (8th Cir. 1992),
cert. denied, 508 U.S. 916 (1993) 32

Bonin v. Vasquez,
999 F.2d 425 (9th Cir. 1993) 32

Booker v. Singletary,
90 F.3d 440 (11th Cir. 1996) 32

Brooks v. Walls,
301 F.3d 839 (7th Cir. 2002),
cert. denied, 538 U.S. 1001 (2003) 44

Browder v. Director, Dept. of Corrections,
434 U.S. 257 (1978) 16, 26, 29, 30

Buell v. Anderson,
48 Fed. Appx 491 (6th Cir. Sept. 24, 2002)
(unpublished) 19

Burris v. Parke,
130 F.3d 782 (7th Cir.),
cert. denied, 522 U.S. 990 (1997) 19

Calderon v. Thompson,
523 U.S. 538 (1998) 14, 18, 19, 36, 41

Carey v. Saffold,
536 U.S. 214 (2002) 40, 43

Carter v. United States,
150 F.3d 202 (2nd Cir. 1998) 36

Castro v. United States,
540 U.S. 375 (2003) 27

Caton v. Clarke,
70 F.3d 64 (8th Cir. 1995),
cert. denied, 517 U.S. 1173 (1996) 36

Clay v. United States,
537 U.S. 522 (2003) 14

Coates v. Byrd,
211 F.3d 1225 (11th Cir. 2000),
cert. denied, 531 U.S. 1166 (2001) 45

Coleman v. Thompson,
501 U.S. 722 (1991) 26

Conner v. Lemaster,
1999 U.S. App. LEXIS 2495
(10th Cir. Feb. 18, 1999) (unpublished) 44

Cooper v. Oklahoma,
517 U.S. 348 (1996) 22

Cornell v. Nix,
119 F.3d 1329 (8th Cir. 1997) 22

Crawley v. Catoe,
257 F.3d 395 (4th Cir. 2001),
cert. denied, 534 U.S. 1080 (2002) 44

Delancy v. Florida Department of Corrections,
246 F.3d 1328 (11th Cir. 2001) 5

Devino v. Duncan,
215 F.Supp.2d 414 (S.D.N.Y. 2002) 36

Dodd v. United States,
No. 04-5286 (argued Mar. 28, 2005) 43, 45

Drew v. Department of Corrections,
297 F.3d 1278 (11th Cir. 2002),
cert. denied, 537 U.S. 1237 (2003) 5, 40

Dukes v. Garcia,
53 Fed. Appx. 458 (9th Cir. Dec. 13, 2002)
(unpublished) 45

Duncan v. Walker,
533 U.S. 167 (2001) 43

Dunlap v. Litscher,
301 F.3d 873 (7th Cir. 2002),
cert. denied, 539 U.S. 962 (2003) 19

Dunn v. Cockrell,
302 F.3d 491 (5th Cir. 2002),
cert. denied, 537 U.S. 1181 (2003) 20

Engle v. Isaac,
456 U.S. 107 (1982) 25

Fackelman v. Bell,
564 F.2d 734 (5th Cir. 1977) 20

Farris v. United States,
333 F.3d 1211 (11th Cir. 2003) 20

Felker v. Turpin,
518 U.S. 651 (1996) 14, 23, 31

Fierro v. Johnson,
197 F.3d 147 (5th Cir. 1999),
cert. denied, 530 U.S. 1206 (2000) 22

Freeman v. Page,
208 F.3d 572 (7th Cir.),
cert. denied, 531 U.S. 946 (2000) 44

Gant v. United States,
1993 U.S. App. LEXIS 26819
(7th Cir. Oct. 5, 1993) (unpublished),
cert. denied, 510 U.S. 1183 (1994) 32

Gee v. Shillinger,
1998 U.S. App. LEXIS 2644
(10th Cir. Feb. 18, 1998) (unpublished) 22

Godinez v. Moran,
509 U.S. 389 (1993) 21

Gonzalez v. Secretary for the Florida Dept. of Corrections,
317 F.3d 1308 (11th Cir.),
vacated and hearing en banc granted,
326 F.3d 1175 (11th Cir. 2003) 5

Gonzalez v. Crosby,
366 F.3d 1253 (11th Cir. 2004) (en banc) 1

Gutierrez v. Schomig,
233 F.3d 490 (7th Cir. 2000),
cert. denied, 532 U.S. 950 (2001) 45

Guyton v. United States,
23 Fed. Appx. 539 (7th Cir. Sept. 26, 2001)
(unpublished) 36

Hamdi v. Rumsfeld,
124 S.Ct. 2633 (2004) 32

Hamilton v. Newland,
374 F.3d 822 (9th Cir. 2004),
cert. denied, 2005 U.S. LEXIS 2307 (Mar. 7, 2005) 36

Harris v. Nelson,
394 U.S. 286 (1969) 17, 26, 28, 30

Harvey v. Horan,
278 F.3d 370 (4th Cir. 2002) 35

Hawkins v. Evans,
64 F.3d 543 (10th Cir. 1995) 36

Hazel-Atlas Glass Co v. Hartford-Empire Co.,
322 U.S. 238 (1944) 18, 40

Henry v. Department of Corrections,
197 F.3d 1361 (11th Cir. 1999) 41

Hernandez v. Peirson,
2000 U.S. App. LEXIS 30179
(7th Cir. Nov. 27, 2000) (unpublished),
cert. denied, 532 U.S. 1068 (2001) 44

Herrera v. Collins,
506 U.S. 390 (1993) 22, 23

Hess v. Cockrell,
281 F.3d 212 (5th Cir. 2002) 21

Hilterman v. Furlong,
1998 U.S. App. LEXIS 22159
(10th Cir. Sept. 11, 1998) (unpublished) 19

Howard v. Lewis,
905 F.2d 1318 (9th Cir. 1990) 36

Hunt v. Hopkins,
266 F.3d 934 (8th Cir. 2001) 35

Hunt v. Nuth,
57 F.3d 1327 (4th Cir. 1995),
cert. denied, 516 U.S. 1054 (1996) 32

In re Abdur'Rahman,
392 F.3d 174 (6th Cir. 2004) (en banc) 25, 32, 36, 41

In re Cook,
215 F.3d 606 (6th Cir. 2000) 35-36

Ingrati v. United States,
2004 U.S. Dist. LEXIS 13492
(D. Del. Jul. 14, 2004) (unpublished) 27

Israfil v. Russell,
276 F.3d 768 (6th Cir. 2001),
cert. denied, 535 U.S. 1088 (2002) 44

Johnson v. Wolfe,
41 Fed. Appx. 733 (6th Cir. Jun. 21, 2002)
(unpublished) 44

Jones v. Murray,
976 F.2d 169 (4th Cir. 1992),
cert. denied, 505 U.S. 1245 (1993) 32

Kiel v. Scott,
1999 U.S. App. LEXIS 2500
(10th Cir. Feb. 18, 1999) (unpublished),
cert. denied, 528 U.S. 1115 (2000) 44

Kuhlmann v. Wilson,
477 U.S. 436 (1986) 26, 37

Lazo v. United States,
314 F.3d 571 (11th Cir.),
vacated for rehearing en banc,
326 F.3d 1175 (11th Cir. 2003) 6

Liljeberg v. Health Services Acquisition Corp.,
486 U.S. 847 (1988) 17, 26

Lindsey v. Thigpen,
875 F.2d 1509 (11th Cir. 1989) 32

Lonchar v. Thomas,
517 U.S. 314 (1996) 12, 14, 26, 30, 31, 41

Lopez v. Douglas,
141 F.3d 974 (10th Cir.),
cert. denied, 525 U.S. 1024 (1998) 22

Magouirk v. Phillips,
144 F.3d 348 (5th Cir. 1998) 16

Martinez v. Johnson,
104 F.3d 769 (5th Cir.),
cert. denied, 522 U.S. 875 (1997) 30

McBride v. Sharpe,
25 F.3d 962 (11th Cir.) (en banc),
cert. denied, 513 U.S. 990 (1994) 30

McClesky v. Zant,
499 U.S. 467 (1991) 22

McFarland v. Scott,
512 U.S. 849 (1994) 16

McKnight v. White,
1995 U.S. App. LEXIS 28811
(10th Cir. Oct. 16, 1995) (unpublished) 21

McQueen v. Scroggy,
99 F.3d 1302 (6th Cir. 1996),
cert. denied, 520 U.S. 1257 (1997),
overruled on other grounds, In re Abdur'Rahman,
392 F.3d 174 (6th Cir. 2004) (en banc) 32

Mercer v. Armontrout,
864 F.2d 1429 (8th Cir. 1988) 22

Merritt v. Blaine,
326 F.3d 157 (3rd Cir.),
cert. denied, 540 U.S. 921 (2003) 44

Miller v. Dragovich,
311 F.3d 574 (3rd Cir. 2002),
cert. denied, 540 U.S. 859 (2003) 44

Miller-El v. Cockrell,
537 U.S. 322 (2003) 13

Mobley v. Head,
306 F.3d 1096 (11th Cir. 2002),
vacated and hearing en banc granted,
326 F.3d 1175 (11th Cir. 2003) 6

Moore v. Mote,
368 F.3d 754 (7th Cir. 2004) 35

Morgan v. Money,
2000 U.S. App. LEXIS 1914
(6th Cir. Feb. 8, 2000) (unpublished) 44

Muniz v. United States,
236 F.3d 122 (2nd Cir.2001) 36-37

Ott v. Johnson,
192 F.3d 510 (5th Cir. 1999),
cert. denied, 529 U.S. 1099 (2000) 44-45

Pace v. DiGuglielmo,
No. 03-9627 (argued Feb. 28, 2005) 43, 44

Palmer v. Corcoran,
1999 U.S. App. LEXIS 23336
(4th Cir. Sept. 24, 1999) (unpublished) 44

Phelps v. Alameda,
366 F.3d 722 (9th Cir. 2004) 21

Pioneer Investment Services Co. v. Brunswick
Associates Limited Partnership,
507 U.S. 393 (1993) 41-42

Pitchess v. Davis,
421 U.S. 482 (1975) 17, 28, 29, 30

Plaut v. .Spendthrift Farm, Inc.,
514 U.S. 211 (1995) 18, 34

Polites v. United States,
364 U.S. 426 (1960) 21

Pridgen v. Shannon,
380 F.3d 721 (3rd Cir. 2004),
cert. denied, 2005 U.S. LEXIS 1587 (Feb. 22, 2005) 20, 36

Reinoso v. Artuz,
1999 U.S. Dist. LEXIS 7768
(S.D.N.Y. May 25, 1999) (unpublished) 36

Rhine v. Boone,
182 F.3d 1153 (10th Cir. 1999),
cert. denied, 528 U.S. 1084 (2000) 45

Rhines v. Weber,
___ S.Ct. ___, 2005 U.S. LEXIS 2930 (No. 03-9046)
(Mar. 30, 2005) 12-13, 27, 39, 43, 45

Ritter v. Smith,
811 F.2d 1398 (11th Cir.),
cert. denied, 483 U.S. 1010 (1987) 32

Rivers v. Roadway Express, Inc.,
511 U.S. 298 (1994) 42

Robles v. Senkowsi,
1999 U.S. Dist. LEXIS 11565
(S.D.N.Y. Jul. 30, 1999) (unpublished) 36

Rodwell v. Pepe,
324 F.3d 66 (1st Cir.),
cert. denied, 540 U.S. 873 (2003) 22

Romaine v. Woods,
2000 U.S. App. LEXIS 18606
(9th Cir. Jul. 26, 2000) (unpublished) 44

Roper v. Simmons,
125 S.Ct. 1183 (2005) 23

Sanders v. United States,
373 U.S. 1 (1963) 33, 37

Santana v. United States,
98 F.3d 752 (3rd Cir. 1996) 17

Sargent v. Columbia Forest Prods.,
75 F.3d 86 (2nd Cir. 1996) 19

Schlanger v. Seamans,
401 U.S. 487 (1971) 26

Schlesinger v. Councilman,
420 U.S. 738 (1975) 39

Schlup v. Delo,
513 U.S. 298 (1995) 22

Scott v. Singletary,
38 F.3d 1547 (11th Cir. 1994),
cert. denied, 515 U.S. 1145 (1995) 22

Semtek Int'l Inc. v. Lockheed Martin Corp.,
531 U.S. 497 (2001) 34

Siebert v. Campbell,
334 F.3d 1018 (11th Cir. 2003) 44

Singleton v. Norris,
319 F.3d 1018 (8th Cir.) (en banc),
cert. denied, 540 U.S. 832 (2003) 33

Slack v. McDaniel,
529 U.S. 473 (2000) 16, 18, 32, 33, 34, 35, 36

Smaldone v. Senkowski,
273 F.3d 133 (2nd Cir. 2001),
cert. denied, 535 F.3d 1017 (2002) 45

Smith v. Angelone,
111 F.3d 1126 (4th Cir.),
cert. denied, 521 U.S. 1131 (1997) 17

Snow v. Ault,
238 F.3d 1033 (8th Cir.),
cert. denied, 532 U.S. 998 (2001) 45

Stafford v. Thompson,
328 F.3d 1302 (11th Cir. 2003) 44

Stewart v. Martinez-Villareal,
523 U.S. 637 (1998) 18, 33, 38

Tal v. Miller,
1999 U.S. Dist. LEXIS 652
(S.D.N.Y. Jan. 27, 1999) (unpublished) 36

Teague v. Lane,
489 U.S. 288 (1989) 42

Thompson v. Calderon,
151 F.3d 918 (9th Cir. 1998) (en banc) 20

Turner v. Terhune,
78 Fed. Appx. 29 (9th Cir. Sept. 8, 2003)
(unpublished) 33

Tyler v. Cain,
533 U.S. 656 (2001) 13, 14

United States v. Rich,
141 F.3d 550 (5th Cir. 1998),
cert. denied, 526 U.S. 1011 (1999) 22

United States v. Winestock,
340 F.3d 200 (4th Cir.),
cert. denied, 540 U.S. 995 (2003) 19

United States ex rel. Stachulak,
520 F.2d 931 (7th Cir. 1975),
cert. denied, 424 U.S. 947 (1976) 30

Vega v. Artuz,
2002 U.S. Dist. LEXIS 17204
(S.D.N.Y. Sept. 12, 2002) (unpublished) 36

Wade v. Battle,
379 F.3d 1254 (11th Cir. 2004) 44

Wainwright v. Sykes,
433 U.S. 72 (1977) 16

Warren v. Garvin,
219 F.3d 111 (2nd Cir.),
cert. denied, 531 U.S. 968 (2000) 20

Webster v. Moore,
199 F.3d 1256 (11th Cir.),
cert. denied, 531 U.S. 991 (2000) 44

Wiggins v. Smith,
539 U.S. 510 (2003) 24

Williams v. Cain,
217 F.3d 303 (5th Cir. 2000) 44

Williams v. Chrans,
42 F.3d 1137 (7th Cir. 1994) 21

Williams v. Sims,
390 F.3d 958 (7th Cir. 2004) 44

Williams v. Taylor,
529 U.S. 420 (2000) 13, 16, 43

Williams v. Whitley,
994 F.2d 226 (5th Cir.),
cert. denied, 510 U.S. 1014 (1993) 32

Withrow v. Williams,
507 U.S. 680 (1993) 25, 46

Woodford v. Garceau,
538 U.S. 202 (2003) 16

Wright v. Norris,
299 F.3d 926 (8th Cir. 2002) 44

Yee v. City of Escondido,
503 U.S. 519 (1992) 31

Zimmer St. Louis, Inc. v. Zimmer Co.,
32 F.3d 357 (8th Cir. 1994) 30

State Cases

Cox v. State,
522 P.2d 173 (Kan. 1974) 23

State v. Bonnell,
831 P.2d 434 (Ariz. Ct. App. 1992) 23

State v. Thompson,
735 So. 2d 482 (Fla. 1999). 3

Thompson v. State,
887 So.2d 1260 (Fla. 2004) 23

Federal Statutes, Rules, and Legislative History

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2244(b) ..... passim

28 U.S.C. § 2244(d) ..... passim

28 U.S.C. § 2253(c) 14, 16, 41, 42

28 U.S.C. § 2254 ..... passim

Federal Rule of Appellate Procedure 4(a) 20, 29, 30

Federal Rule of Civil Procedure 1 ..... 2, 27

Federal Rule of Civil Procedure 33 28

Federal Rule of Civil Procedure 41(b) 30

Federal Rule of Civil Procedure 52 ..... 29, 30

Federal Rule of Civil Procedure 54(b) 30

Federal Rule of Civil Procedure 56(c) 30

Federal Rule of Civil Procedure 59 ..... 29, 30

Federal Rule of Civil Procedure 60(b) ..... passim

Federal Rule of Civil Procedure 81(a)(2)
..... 2, 9, 17, 26, 28, 29, 39

Rules Governing Section 2254 Cases, Rule 2 33

Rules Governing Section 2254 Cases, Rule 3
(as amended) 15, 33

Rules Governing Section 2254 Cases, Rule 9(a) 15, 31

Rules Governing Section 2254 Cases, Rule 9(b) 32, 38

Rules Governing Section 2254 Cases, Rule 9
(as amended) 15-16, 38

Rules Governing Section 2254 Cases, Rule 11
..... 2, 9, 17, 26-27, 39

Rules Governing Section 2254 Cases, Rule 11
(as amended) 27

Pub. L. 104-132, 110 Stat. 1214 (April 24, 1996)
(Anti-Terrorism and Effective Death Penalty Act
("AEDPA")) 12

H.R. Rep. No. 242, Part 1A, 102d Cong. (1991) 12

H.R. 4018, 103 H. Rpt. 470, 103d Cong.
(March 25, 1994) 13

H.R. 729, 104 H. Rpt. 23, 104th Cong., 1st Sess. (1995) 13

H.R. 729, 141 Cong. Rec. H. 1400
(daily ed. Feb. 8, 1995) 12

H.R. Conf. Rec. H. No. 47, 104th Cong.,
2d Sess. (1996), 142 Cong. Rec. H. 3305 13

H.R. Conf. Rep. No. 50, 104th Cong., 2d Sess (1996),
142 Cong. Rec. H. 3605 11

S. 623, 141 Cong. Rec. S. 4590
(daily ed. Mar. 24, 1995) 12

S. 735, 141 Cong. Rec. S. 7656
(daily ed. Jun. 5, 1995) 14

S. 735, 141 Cong. Rec. S. 7803
(daily ed. Jun. 7, 1995) 11, 14

S. Conf. Rep. No. 49, 104th Cong., 2d Sess. (1996),
142 Cong. Rec. S. 3454 11

State Statutes and Rules

Code of Ala. Code § 13A-5-59 (2004) 23

Colo. Rev. Stat. § 18-1.3-401(5) (2004) 23

725 ILCS 5/122-1(2)(f) (2004) 23

Fla. Stat. § 775.082(2) (2004) 23

Miss. Code Ann. § 99-19-107 (2004) 23

Miss. Code Ann. § 99-39-23(6) (2004) 23

Mo. Rev. Stat. § 565.040 (2004) 23

Nev. Rev. Stat. § 176.555 (2004) 23

N.M. Stat. Ann. § 31-18-14B (2005) 23

Okla. Stat. § 701.15 (2004) 23

S.D. Codified Laws § 23A-27A-14 (2003) 23

Utah Code Ann. § 76-3-207(7) (2004) 23

Wash. Rev. Code § 10.95.090 (2004) 23

Wis. Stat. § 974.06 (2004) 23

Colo. Crim. P. 35 (2005) 23

Fla. R. Crim. P. 3.850 (2004) 3, 23

Mich. Ct. R. 6.502(a)(2) (2005) 23

Other Authority

"Ad Hoc Committee On Federal Habeas Corpus In
Capital Cases," Committee Report, 45 Crim. L. Rpt.
(BNA) 3239 (1989) 12, 15

Black's Law Dictionary (5th ed. 1979) 39

Randy Hertz, Federal Habeas Corpus Practice and
Procedure (Matthew Bender, 2001) 14

Jeffrey, Article: Successive Habeas Corpus Petitions And Section 2255 Motions After The Antiterrorism And Effective Death Penalty Act Of 1996: Emerging Procedural And Substantive Issues, 84 Marq. L. Rev. 43 (2000) 34

Moore's Federal Practice (Matthew Bender 3d ed. 1997) 14, 20, 21, 24, 31

U.S. Dept. of Justice, Bureau of Justice Statistics, J. Scalia, Special Report - Prisoner Petitions Filed In U.S. District Courts, 2000, with Trends 1980-2000, Jan. 2002, NCJ-189430 46

U.S. Dept. of Justice, Federal Justice Statistics Program, Bureau of Justice Statistics, J. Scalia, Prisoner Petitions in the Federal Courts, 1980-96, Oct. 1997, NCJ-164615 46

No. 04-6432

IN THE
SUPREME COURT OF THE UNITED STATES

AURELIO O. GONZALEZ,

Petitioner,

vs.

JAMES V. CROSBY,

Respondent.

OPINION BELOW

The opinion below is reported as Gonzalez v. Crosby, 366 F.3d 1253 (11th Cir. 2004) (en banc), and is published in the Joint Appendix ("J.A.") at pp. 22-125.

JURISDICTION

On April 26, 2004, the United States Court of Appeals for the Eleventh Circuit en banc affirmed the judgment of the district court dismissing petitioner's Rule 60(b) motion that sought review of the denial of Gonzalez's petition for writ of habeas corpus. Petitioner filed his petition for writ of certiorari on July 22, 2004, which the Court granted on January 14, 2005. Jurisdiction lies pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS

This case involves 28 U.S.C. § 2244(b)(1), Rule 60(b) of Federal Rule of Civil Procedure, and 28 U.S.C. § 2254, Rule 11, which are set forth in the Joint Appendix. J.A. 126-129. The following rules are also involved:

Federal Rule of Civil Procedure 1: **Scope and Purpose of Rules**

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

Federal Rule of Civil Procedure 81(a)(2):

These rules are applicable to proceedings for . . . habeas corpus . . . to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions. . . .

STATEMENT OF THE CASE

State Court Proceedings

Petitioner, Aurelio O. Gonzalez, pled guilty to committing three counts of robbery with a firearm, one count of armed burglary, and one count of armed kidnapping, in the Circuit Court of Dade County, Florida. The trial court sentenced petitioner on December 8, 1982,[1] to a term of ninety-nine (99) years imprisonment. See J.A. 2; Appendix To Response, Exh. A. A

[1] The Eleventh Circuit's opinion mistakenly reflects a sentencing date in 1992. J.A. 32.

direct appeal was not taken.[2] Petitioner's first state postconviction relief motion, brought pursuant to Florida Supreme Court Rule 3.850 and filed on August 8, 1994, was denied as "legally insufficient" on September 14, 1994. See J.A. 2; Appendix To Response, Exh. D. On January 18, 1995, the Florida District Court of Appeal for the Third District summarily upheld the denial of relief, and rehearing was denied on February 8, 1995. Id., Exh. H. Petitioner subsequently filed a successive motion for postconviction relief on November 25, 1996, outside the two-year state limitation period under Rule 3.850(b), which was denied on December 10, 1996. Id., Exh. I, J (respectively). The state intermediate appellate court upheld the lower court's ruling summarily on April 9, 1997. Rehearing was denied on May 7, 1997, Id., Exh. L, and the mandate issued on May 23, 1997.

District Court and Eleventh Circuit Panel Proceedings

Petitioner filed his petition for writ of habeas corpus in the United States District Court of Florida, Southern Division on June 23, 1997. J.A. 1. He raised one ground for relief, asserting that newly discovered evidence rendered his guilty pleas invalid. Id.; Petition, at 4. The State, in its response to a show cause order, asserted that the petition was time-barred and, in addition, the claim was procedurally defaulted. J.A. 2; Response To Order To Show Cause, at 4-5. The district court permitted petitioner to amend his petition, J.A. 2, which was filed on November 12, 1997. Id. Therein petitioner argued that newly discovered evidence demonstrated that his sentence was based upon another individual's criminal record. Id.; Amended Motion For Petition Of Habeas Corpus, at 1. In its response to the amended petition, the State reasserted its earlier arguments, and that petitioner's new claim was

[2] Any challenge to the voluntariness of Petitioner's guilty plea should have been asserted on direct appeal. State v. Thompson, 735 So. 2d 482, 485 (Fla. 1999).

not cognizable. J.A. 2; Response To Amended Petition For Habeas Corpus, at 2-4.

On July 16, 1998, the magistrate judge issued her "Report Re Dismissal §2254 Petition As Time Barred," recommending dismissal of the petition as having been filed outside of the one-year limitation period under 28 U.S.C. § 2244(d). J.A. 2. Petitioner filed objections to the recommendation. Id. The magistrate judge subsequently issued a "Supplemental Report" on August 17, 1998, again recommending dismissal of the petition as time-barred. Id. at 3. The district court entered its "Order Of Dismissal of §2254 Petition As Time Barred" on September 9, 1998. Id.

On September 23, 1998, petitioner filed his notice of appeal from the denial of habeas corpus relief, id., and filed a motion for a certificate of appealability ("COA"). Id. In an Order dated October 19, 1998, the district court granted COA without elaboration. Petitioner's appeal, docketed as No. 98-5545-F, was dismissed without prejudice on October 28, 1999, and the application for COA remanded "to the district court for determination of which issues merit appeal under the amended requirements of 28 U.S.C. § 2253(c)."

Petitioner thereafter filed a new application for COA with the district court, J.A. 4, which was denied on December 10, 1999. Id. Petitioner filed a new "Notice of Appeal" on January 12, 2000, attempting to appeal the denial of COA. Id. at 5. The Eleventh Circuit treated the notice of appeal as an application for COA and dismissed the appeal on April 6, 2000. The mandate issued on April 11, 2000. Id. Thereafter, under the original appeal that had been dismissed without prejudice on October 28, 1999, petitioner submitted to the Eleventh Circuit a "Petition For Rehearing," on or about April 18, 2000, requesting that the court of appeals reconsider the denial of COA in that first appeal. The petition was returned to petitioner unfiled with a letter dated April 26, 2000.

Nearly sixteen months later, on August 2, 2001, petitioner filed his "Rule 60(b) Motion To Amend Or Alter Judgment." J.A. 5. In that motion, petitioner contended that the district court's order of dismissal should be vacated pursuant to Artuz v. Bennett, 531 U.S. 4 (2000), decided by this Court on November 7, 2000, and Delancy v. Florida Department of Corrections, 246 F.3d 1328 (11th Cir. 2001).[3] The district court denied the motion on March 5, 2002, J. A. 5, believing that it was without jurisdiction to entertain the motion on the basis that petitioner had already appealed to the Eleventh Circuit. Petitioner filed a "Notice of Appeal" on April 9, 2002. J.A. 6. The district court denied COA on May 14, 2002. Id.

Under case number 02-12054-JJ, on August 15, 2002, a judge of the court of appeals granted petitioner a COA on the following issue: "Whether the district court erred in dismissing appellant's habeas corpus petition, 28 U.S.C. § 2254, as barred by the one-year statute of limitations provision in the Antiterrorism and Effective Death Penalty Act of 1996." Following briefing by the parties, a panel of the court of appeals issued its opinion on January 10, 2003, whereupon it ruled that "[t]he certificate of appealability previously granted in this case is QUASHED AS IMPROVIDENTLY GRANTED, and the appeal is DISMISSED." Gonzalez v. Secretary for the Florida Dept. of Corrections, 317 F.3d 1308, 1314 (11th Cir.), vacated and hearing en banc granted, 326 F.3d 1175 (11th Cir. 2003).

---

[3] Petitioner apparently relies upon Delancy for the proposition that any successive motion for state postconviction relief is "properly filed" if filed. To the contrary, the Eleventh Circuit has held that an untimely successive state motion is not properly filed under § 2244(d)(2) if it does not meet certain exceptions to a timely filing requirement, Drew v. Department of Corrections, 297 F.3d 1278, 1285 (11th Cir. 2002), cert. denied, 537 U.S. 1237 (2003), a question left open in Artuz, 531 U.S. at 9 n.2.

En Banc Eleventh Circuit Appellate Proceedings

On January 27, 2003, petitioner filed a "Motion To Reconsider, Vacate, Or Modify" before the court of appeals. J.A. 10. That motion was denied as moot, while that court, en banc, on April 1, 2003, issued its order directing that the case be heard en banc, id., in conjunction with Lazo v. United States, No. 02-12483, and Mobley v. Head, No. 02-14224.[4] Gonzalez, 326 F.3d at 1176. The parties in the three cases were directed to address the following issues:

> 1) Is a certificate of appealability required before an appeal may be taken from the denial of a Rule 60(b) motion involving an order or judgment in a 28 U.S.C. § 2255[5] proceeding?
>
> 2) If so, should one issue in this case?
>
> 3) What standards or rules should govern Rule 60(b) motions involving an order or judgment in a 28 U.S.C. § 2255 proceeding. i.e., under what circumstances, if any, should such a motion be granted?
>
> 4) Was it an abuse of discretion for the district court to deny the Rule 60(b) motion in this case?

---

[4] See Lazo v. United States, 314 F.3d 571 (11th Cir.), vacated for rehearing en banc, 326 F.3d 1175 (11th Cir. 2003) and Mobley v. Head, 306 F.3d 1096 (11th Cir. 2002), vacated and hearing en banc granted, 326 F.3d 1175 (11th Cir. 2003). The petition for writ of certiorari filed in the Mobley case, assigned case number 04-6914 before this Court, was denied on January 17, 2005. Certiorari was not sought in Lazo.

[5] Both Gonzalez and Mobley involved state prisoners that sought relief under 28 U.S.C. § 2254; Lazo pertained to a motion to vacate filed by a federal prisoner under 28 U.S.C. § 2255.

J.A. 10.

Subsequently, in a letter dated June 27, 2003, the court of appeals directed the parties to address the following issues by supplemental en banc letter briefs:

> I. "To what extent if any, and how, should the general principles underlying habeas and section 2255 cases guide, and the provisions of AEDPA inform, the decision of whether the grant of Rule 60(b) relief relating to a habeas or section 2255 judgment is available, and if available, is an abuse of discretion?"; and
>
> II. "By analogy to Calderon[v. Thompson, 523 U.S. 538 (1998)], and for the same or similar reasons, should this Court hold that, except in cases of actual fraud on the federal court which issued the judgment denying the habeas corpus petition or section 2255 motion, Rule 60(b) relief from judgment is available only 'to avoid a miscarriage of justice as defined by our habeas corpus jurisprudence."

J.A. 11.

The Eleventh Circuit heard individual oral argument in the three cases, then issued a consolidated opinion on April 26, 2004. J.A. 22. Therein, the en banc court first held that a habeas petitioner must obtain a certificate of appealability in order to appeal an order denying a Rule 60(b) motion. J.A. 35-43. In respect to Gonzalez specifically, the court of appeals determined that he was entitled to a certificate of appealability upon the issue of "[w]hat standards are applicable to Rule 60(b) motions in § 2254 cases, and in light of those standards was it an abuse of discretion for the district court to deny the motion?" J.A. 46. That court subsequently determined that Gonzalez's Rule 60(b)(6) motion

constituted a successive petition, as he was "attacking the merits of that decision [denying his habeas petition] - the term 'merits' referring to the correctness of the decision itself even though the ground of this particular decision was the statute of limitations, an affirmative defense." J.A. 69.

SUMMARY OF ARGUMENT

Congress passed the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") providing for habeas corpus reform specifically directed at curbing abusive tactics long associated with the writ that thwarted finality of criminal convictions and sentences. To effectuate that goal, Congress included provisions to eliminate excessive delay and repetitive filings, including (1) provisions restricting second or successive habeas petitions; and (2) limitations on the availability of appellate review. If Rule 60(b) relief is available as an end-run around these provisions, or as a vehicle to resurrect closed habeas cases, years after they were decided, Congress's policy goal of finality and closure is unquestionably defeated.

Gonzalez asks this Court to hold that Rule 60(b)(6) of the Federal Rules of Civil Procedure may be used to reopen closed habeas cases, solely on the basis of subsequent changes in decisional law occurring years after habeas relief was denied. Such an effort transgresses congressional intent, whereby Rule 60(b) would provide a mechanism by which a petitioner could obtain unbridled review of the final disposition rejecting habeas relief - constituting a second bite at the apple and giving license to boundless litigation. The general availability of Rule 60(b) then creates an end run to 28 U.S.C. § 2244(b), encouraging even greater abuse than that occurring prior to enactment of habeas reform through AEDPA. Accordingly, Rule 81(a)(2) of the Federal Rules of Civil Procedure and Rule 11 of the Rules Governing Section 2254 Cases preclude application of Rule 60(b) under these circumstances.

The fact that Gonzalez's habeas petition was denied as time-barred, rather than following a merits decision on his constitutional claims, does not change this result. Alike other Rule 60(b) motions, petitioner sought reconsideration of the district court's final judgment, a matter controlled by § 2244(b)(1). Here, the district court applied circuit precedent in good faith, holding that

Gonzalez's habeas petition was time-barred. A subsequent decision of this Court interpreting the habeas limitations statute does not strike at the integrity of that judgment and warrant avoidance of the bar of successive litigation under AEDPA.

Moreover, according absolute retroactive effect to rules pertaining to habeas proceedings would elevate the import of those rules beyond what this Court has held appropriate in relation to the underlying judgment of conviction and sentence ultimately under attack, i.e., new rules of constitutional procedural law. Accordingly, the Eleventh Circuit did not err in treating Gonzalez's Rule 60(b) motion as the functional equivalent of a successive petition for which he had not obtained authorization to bring.

ARGUMENT

A MOTION FILED PURSUANT TO RULE 60(b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE SEEKING TO RELITIGATE THE DISMISSAL OF A HABEAS PETITION AS TIME-BARRED CONSTITUTES A PROHIBITED "SECOND OR SUCCESSIVE" PETITION UNDER 28 U.S.C. § 2244(b)(1).

AEDPA precludes reconsideration of habeas petitions adjudicated on the merits raising the same claims presented in an earlier petition. Rule 60(b) allows otherwise. The issue before this Court is whether Congress' intent in subsequently passing AEDPA will be enforced,[6] or whether an expansive rule of civil procedure - non-specific to habeas corpus - stands as a vehicle to evade the legislative mandate narrowing the statutory writ. The correct result in upholding that intent is explained in Gonzalez; anything otherwise infringes on AEDPA's narrow class of circumstances permitting a second bite at the habeas apple.

---

[6] The Senate passed S. 735 by a vote of 91-8, 141 Cong. Rec. S. 7803, 7857 (daily ed. Jun. 7, 1995), and agreed upon the conference report by the same margin. S. Conf. Rep. No. 49, 104th Cong., 2d Sess. (1996), 142 Cong. Rec. S. 3454, 3478. The House voted 293-133 in agreement on the conference report. H.R. Conf. Rep. No. 50, 104th Cong., 2d Sess. (1996), 142 Cong. Rec. H. 3605, 3617.

I.

Wholesale application of Rule 60(b) contravenes federal habeas corpus reform under the Anti-Terrorism and Effective Death Penalty Act of 1996, specifically 28 U.S.C. § 2244(b) as amended.

A. Congress intended to narrow the scope and availability of habeas corpus review with the passage of AEDPA.

Prior to 1996, congressional efforts to effect habeas reform spanned a period of no less than twenty years.[7] That tortured history finally bore fruit in Senate Bill 735, as designated Title I of the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, enacted on April 24, 1996.

As recognized by this Court in construing AEDPA and thus its import, the Act's primary purpose is to ensure greater finality in state and federal criminal judgments of convictions and sentences. See, e.g., Rhines v. Weber, ___ S.Ct. ___, 2005 U.S. LEXIS 2930 *14 (No. 03-9046) (Mar. 30, 2005); Miller-El v. Cockrell, 537 U.S.

[7] See Lonchar v. Thomas, 517 U.S. 314, 333 (1996) (citing the more than 80 bills proposed between 1986 and 1995 seeking to establish a statute of limitations for federal habeas petitions); see also H.R. Rep. No 242, Part 1A, 102d Cong. (1991) ("In recent years, the Congress has been urged to reform the Federal habeas corpus laws to make the process more efficient, promote finality, and ensure fairness."); S. 623, 141 Cong. Rec. S 4590, 4591-4592 (daily ed. Mar. 24, 1995) (summarizing habeas reform efforts in the Senate) (statement of Sen. Spector); H.R. 729, 141 Cong. Rec. H. 1400 (daily ed. Feb. 8, 1995) (recognizing Congress' consideration of habeas reform dating back to 1984) (statement of Rep. McCollum). The impetus for habeas reform arguably began in earnest in 1988, when Chief Justice William H. Rehnquist established the Ad Hoc Committee On Federal Habeas Corpus In Capital Cases, chaired by retired Associate Justice Lewis F. Powell, Jr. The Committee "was to inquire into 'the necessity and desirability of legislation directed toward avoiding delay and the lack of the finality' in capital cases which the prisoner had or had been offered counsel." Committee Report (hereinafter "Powell Report"), 45 Crim. L. Rep. (BNA) 3239 (1989).

322, 337 (2003) ("Statutes such as AEDPA have placed more, rather than fewer, restrictions on the power of federal courts to grant writs of habeas corpus to state prisoners."); Tyler v. Cain, 533 U.S. 656, 661 (2001) ("AEDPA greatly restricts the power of federal courts to award relief to state prisoners who file second or successive habeas corpus applications."); Williams v. Taylor, 529 U.S. 420, 436 (2000) (AEDPA's purpose is "to further the principles of comity, finality, and federalism.").

Legislative history supports the Court's interpretation. In the "Joint Explanatory Statement Of The Committee Of Conference," Congress expressly intended that Title I of AEDPA "incorporate[] reforms to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases." H.R. Conf. Rep. No. 47, 104th Cong. 2d Sess. (1996), 142 Cong. Rec. H. 3305, 3333.[8]

"[J]udgments about the proper scope of the writ are 'normally for Congress to make.'" Felker v. Turpin, 518 U.S. 651,

[8] Prior efforts to reign in abuses associated with federal habeas corpus proceedings reflect the same concerns. For example, in recommending passage of H.R. 4018, the "Habeas Corpus Revision Act of 1994," the House Judiciary Committee wrote:

> The Committee believes that habeas corpus reform legislation is needed because the credibility of the criminal justice system has been tested by unnecessary delays, a seeming lack of finality of State criminal proceedings, and serious deficiencies in the provision of competent counsel to indigent defendants in death penalty cases.

H.R. 4018, 103 H. Rpt. 470, 103d Cong. (March 25, 1994). Nearly a year later, the House Judiciary Committee recommended passage of H.R. 729, the "Effective Death Penalty Act of 1995." 104 H. Rpt. 23, 104th Cong., 1st Sess. (Feb. 8, 1995). In so doing, the report provided that "H.R. 729 has been drafted to address a number of problems that presently exist in federal court criminal litigation .... [and] is designed to reduce the abuse of habeas corpus that results from delayed and repetitive filings." (under "Background and Need for the Legislation").

664 (1996) (quoting Lonchar, 517 U.S. at 323). In order to curtail the delay and repetitiveness associated with the writ, Congress exacted changes through AEDPA concerning, for example, the filing of multiple petitions, the time frame in which the petition must be filed, availability of appellate consideration, and the scope of review. See § 2244(b), § 2244(d), § 2253(c), and § 2254(d), respectively, as amended.

In respect to repetitive filings, Congress unquestionably intended that habeas petitioners have "one bite at the apple." See e.g., S. 735, 141 Cong. Rec. S 7656, 7657 (daily ed. Jun. 5, 1995) (statement of Sen. Dole); S. 735, 141 Cong. Rec. S 7803, 7809 (daily ed. Jun. 7, 1995) (statement of Sen. Kennedy). Section 2244(b)(1), unequivocally providing that "[a] claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed," effectuates that goal. See also Randy Hertz, 2 Federal Habeas Corpus Practice and Procedure (Matthew Bender, 2001), § 28.4[a]. A "*successive claim* is a term of art referring to a claim that has been raised in a previous petition." 28 Moore's Federal Practice, § 671.10[2][a] (Matthew Bender 3d ed. 1997) (hereinafter "Moore") (emphasis in original). The plain language of § 2244(b)(1) is that further consideration of a claim previously raised is unequivocally prohibited. See Tyler, 533 U.S. at 661.

The Court "presume[s] that Congress expects its statutes to be read in conformity with this Court's precedents. . . ." Clay v. United States, 537 U.S. 522, 527 (2003). Statutory interpretation of habeas is informed "by the general principles underlying our habeas corpus jurisprudence." Calderon v. Thompson, 523 U.S. 538, 554 (1998). As the Eleventh Circuit recognized in Gonzalez, this Court's decisions reflect the narrowing of the availability of endless habeas litigation:

> [t]he evolution has been toward greater finality of judgments through increasingly tight restrictions on second or successive petitions. We have gone from

> the days of the more permissive ends of justice and abuse of the writ standards, see, e.g., *Sanders v. United States, 373 U.S. 1, 12, 83 S. Ct. 1068, 1075, 10 L. Ed. 2d 148 (1963)*; to the post-McCleskey era with its less permissive cause and prejudice standard, see, e.g., *McCleskey v. Zant, 499 U.S. 467, 493, 111 S. Ct. 1454, 1470, 113 L. Ed. 2d 517 (1991); Sawyer v. Whitley, 505 U.S. 333, 338, 112 S. Ct. 2514, 2518, 120 L. Ed. 2d 269 (1992)*; to the present post-AEDPA times, with a total ban on claims that were presented in a prior petition, *§ 2244(b)(1)*, and a near-total ban on those that were not, see *§ 2244(b)(2)*.

J.A. 47.

As demonstrated above, the statutory writ of habeas corpus accorded under § 2254, particularly upon enactment of AEDPA, is neither equivalent to nor otherwise analogous with general equity-based civil proceedings.[9]

---

[9] Instructive is Congress' treatment through AEDPA of habeas law other than § 2244(b), which also demonstrates that Congress in no way intended for unrestrained equitable principles to govern habeas corpus litigation. For example:

Rule 9(a) of the Rules Governing Section 2254 Cases previously governed the filing of "delayed petitions." Rather than establishing a statute of limitations, Rule 9(a) was based upon the equitable doctrine of laches. 28 U.S.C. § 2254, Rule 9, Advisory Committee Notes (1976 Adoption). With the one-year limitation period created under AEDPA, Congress limited the courts' broad discretion in entertaining what typically were 11th hour filings in capital cases, see Powell Report, 45 Crim. L Rep. at 3240, establishing instead specific criteria for evaluating whether the petition was timely filed. §§ 2244(d)(1) and (d)(2); see also 28 U.S.C. § 2254, Rule 3(c) (effective December 1, 2004) (adding the provision that "[t]he time for filing a petition is governed by 28 U.S.C. § 2244(d)."); 28 U.S.C. § 2254, Rule 9 (effective December 1, 2004) (removing subsection (a) pertaining to "Delayed petitions."); Rule 9 Notes of Advisory Committee on 2004 amendments.

B. Rule 60(b), on the other hand, expansively permits review of final civil judgments, contradictory of the principles underlying AEDPA and this Court's habeas jurisprudence.

Federal habeas corpus, though a civil remedy, is different from general civil litigation. Browder v. Director, Dept. of Corrections of Illinois, 434 U.S. 257, 269 (1978).[10]

Prior to passage of AEDPA, a habeas petitioner could obtain appellate review of the denial of relief upon the grant of a certificate of probable cause ("CPC"). 28 U.S.C. § 2253 (1994). Because there was no requirement that a specific issue warranting appellate review be identified, habeas petitioners were free to raise any or all issues brought in the underlying petition. Magouirk v. Phillips, 144 F.3d 348, 356-357 (5th Cir. 1998). That practice has changed under AEDPA. Although the standard for authorizing appellate review remains that as pronounced in Barefoot v. Estelle, 463 U.S. 880, 894 (1983), see Slack v. McDaniel, 529 U.S. 473, 483-484 (2000), the petitioner must obtain a certificate of appealability, requiring that petitioner make a substantial showing of the denial of a constitutional right *as to each issue* for which the certificate is granted. See 28 U.S.C. §§ 2253(c)(2) and (c)(3). AEDPA put an end to unbridled appellate review of frivolous appeals. See Barefoot, 463 U.S. at 892-893.

In furtherance of AEDPA's goals of comity, finality, and federalism, Congress also amended the scope of habeas review. 28 U.S.C. §§ 2254(d) and (e); see Woodford v. Garceau, 538 U.S. 202, 206 (2003) ("AEDPA in general and § 2254(d) in particular focus in large measure on revising the standards used for evaluating the merits of a habeas application."). These changes, defining the standard upon which a claim for relief is reviewed, the deference to be accorded state court findings of fact, and the availability of federal evidentiary hearings, are consummate with this Court's discussion of the writ. See, e.g., Williams, 529 U.S. at 436; McFarland v. Scott, 512 U.S. 849, 859 (1994) ("A criminal trial is the 'main event' at which a defendant's rights are to be determined, and the Great Writ is an extraordinary remedy that should not be employed to 'relitigate state trial.'") (internal citation omitted); Wainwright v. Sykes, 433 U.S. 72, 90 (1977).

[10] Habeas corpus cases are, in effect,

> hybrid actions whose nature is not adequately captured by the phrase 'civil action'; they are independent civil dispositions of completed criminal proceedings. James S. Liebman, 1 FEDERAL HABEAS CORPUS PRACTICE & PROCEDURE § 2.1, at 3 (1988). The 'civil' label is attached to habeas proceedings to distinguish them from 'criminal' proceedings, which are intended to punish and require various constitutional guarantees. . . .

Smith v. Angelone, 111 F.3d 1126, 1130 (4th Cir.) (quoting Santana v. United States, 98 F.3d 752, 754-755 (3rd Cir. 1996)), cert. denied, 521 U.S. 1131 (1997).

Rule 60(b) takes no account of the differences. See, e.g., Pitchess v. Davis, 421 U.S. 482, 489 (1975) ("[E]ven if Rule 60(b) could be read to apply to this situation," the habeas exhaustion requirement applies to Rule 60(b) motions *notwithstanding that the civil rule is silent on the issue*). Thus Rule 60(b), without regard to the statutory command of 28 U.S.C. § 2254, provides a broad mechanism by which district courts acting in equity may relieve a party of a final judgment. Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 863 (1988).[11] "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons . . . ."[12] At issue is whether Rule 60(b) may be

---

[11] While Congress did not amend Rule 60 upon promulgating AEDPA to reflect its nonapplication, see Petitioner's Brief (hereinafter "Pet.Br."), at 14-15, Fed.R. Civ.P. 81(a)(2) and Rule 11 of the Rules Governing Section 2254 Cases, do limit the applicability of the rules of procedure to the extent they conflict with habeas. And, this Court has interpreted Rule 81(a)(2) in the absence of Congressional language limiting the applicability of the civil rules in habeas proceedings. See Harris v. Nelson, 394 U.S. 286 (1969), and Pitchess v. Davis, 421 U.S. 482 (1975). In fact, prior to passage of AEDPA the courts were applying the abuse of the writ doctrine to Rule 60(b) motions. See infra, at 32 & n.26.

[12] The bases for relief include:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the

invoked upon a final disposition of a habeas petition, thus implicating subsequent adjudication where the same claims are presented, as compared to where review was not complete, for example, a dismissal for lack of exhaustion, Slack v. McDaniel, 529 U.S. 473 (2000), or that a claim was not addressed for lack of ripeness. Stewart v. Martinez-Villareal, 523 U.S. 637 (1998). Because Congress through AEDPA intended to provide habeas petitioners with one opportunity to seek habeas relief, the distinction is significant. See infra, at 33-39.

Rule 60(b) relief "devitalize[s] the judgment." Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 245 (1944). The effect of granting a Rule 60(b) motion is to vacate the original judgment, thereby according the habeas petitioner precisely what § 2244(b)(1) precludes: relitigation of adjudicated claims previously presented. This was the very point the Court recognized in Calderon, 523 U.S. at 553, in discussing the effect of an appellate court recalling its mandate. In Gonzalez, the Eleventh Circuit succinctly reasoned that Calderon logically applies, as a motion to recall the mandate and a Rule 60(b) motion similarly are limited to addressing extraordinary circumstances. See Calderon, 523 U.S. at 550 (motion to recall the mandate); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 233 (1995) (Rule 60(b) motion). Calderon relied upon the fact that habeas cases are different. And that assessment is not an aberration, as a Rule 60(b) motion has been viewed as equivalent to a motion to recall the mandate. See, e.g., Sargent v. Columbia Forest Prods., 75 F.3d 86, 89 (2nd Cir. 1996); Burris v. Parke, 130 F.3d 782, 783 (7th Cir.), cert. denied,

---

judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Rule 60(b) also does not preclude "an independent action to relieve a party from a judgment, order, or proceeding...." While not the basis upon which Gonzalez sought to relitigate the denial of his habeas petition, such broad terms conceivably could be invoked to completely bypass habeas corpus review under § 2254 of a state court judgment.

522 U.S. 990 (1997); J.A. 58-59. And because entertaining a Rule 60(b) motion in a habeas proceeding constitutes reconsideration of the basis for the final judgment and presents the same claims as originally presented, it is irrelevant whether an adjudication reached the underlying constitutional claims raised in a habeas petition or that the petition itself was denied on a non-technical procedural basis, as time-barred or that the claims were denied as procedurally barred. Thus contrary to petitioner's assertion, Pet.Br. at 17, there is nothing "unrelated and inapposite" about Calderon as applied by the Eleventh Circuit.[13]

Review of the bases for relief from judgment under Rule 60(b) evidences why the rule infringes upon AEDPA's narrow class of circumstances which permit a second bite at the habeas apple:[14]

Under (b)(1) of Rule 60, a judgment may be reopened based upon mistake, inadvertence, surprise, or excusable neglect. Although § 2244(b)(1) precludes consideration of claims that were the subject of an earlier petition, Rule 60(b)(1) squarely would permit just that. Hilterman v. Furlong, 1998 U.S. App. LEXIS 22159 (10th Cir. Sept. 11, 1998) (unpublished) (reconsideration through Rule 60(b)(1) sought of underlying constitutional claims previously decided where counsel failed to file objections to magistrate's report and recommendation); see also Warren v. Garvin, 219 F.3d 111, 114-115 (2nd Cir.) (Rule 60(b)(1) the basis

---

[13] In addition to the Eleventh Circuit in Gonzalez, J.A. 52-62, other circuit courts of appeal have adopted the logic in Calderon in the context of Rule 60(b) motions seeking review of the denial of a habeas petition. See, e.g., United States v. Winestock, 340 F.3d 200, 206 (4th Cir.), cert. denied, 540 U.S. 995 (2003); Buell v. Anderson, 48 Fed. Appx. 491, 495 n.2 (6th Cir. Sept. 24, 2002) (unpublished); Dunlap v. Litscher, 301 F.3d 873, 875 (7th Cir. 2002), cert. denied, 539 U.S. 962 (2003).

[14] Rule 60(b)(3), permitting the reopening of a final judgment based upon fraud perpetrated upon the district court, does not undermine the balancing of interests in furtherance of finality made by Congress as opposed to the other clauses under Rule 60(b). See infra, at 39-40.

for reviewing whether untimely petition should be deemed timely), cert. denied, 531 U.S. 968 (2000).[15]

Rule 60(b)(2) "permit[s] a remedy when new evidence is discovered following the trial [and] . . . permits a court to set the judgment aside." 12 Moore, § 60.42[1][a]. This provision conflicts with 28 U.S.C. § 2244(b)(2)(B) two-fold by circumscribing the very limited circumstances in which newly discovered evidence may provide a basis for review of habeas claims, and evading the requirement that such claims be new. Rule 60(b)(2) has been invoked in habeas proceedings. See, e.g., Pridgen v. Shannon, 380 F.3d 721, 722 (3rd Cir. 2004), cert. denied, 2005 U.S. LEXIS 1587 (Feb. 22, 2005); Farris v. United States, 333 F.3d 1211, 1216 (11th Cir. 2003); Thompson v. Calderon, 151 F.3d 918, 920 (9th Cir. 1998) (en banc).

A void judgment may be reopened under Rule 60(b)(4). While a judgment is not void because it may be erroneous, the clause has been held applicable where the district court lacks jurisdiction over the parties or subject matter or acts in a manner inconsistent with due process. 12 Moore, § 60.44[1][a]. Clause (b)(4) has been invoked in habeas proceedings to attack a judgment denying relief upon, for example, a change in the law, Blackmon v. Armontrout, 61 Fed. Appx. 985, 986 (8th Cir. Mar. 12, 2003) (unpublished) (relying upon Godinez v. Moran, 509 U.S. 389 (1993)), cert. denied, 540 U.S. 846 (2003), the denial of a "full and fair" evidentiary hearing on an issue upon which relief was denied, McKnight v. White, 1995 U.S. App. LEXIS 28811 *2 (10th Cir. Oct. 16, 1995) (unpublished), and additional evidence in support of a constitutional challenge to the state court judgment. Williams v. Chrans, 42 F.3d 1137, 1138 (7th Cir. 1994). The clause clearly provides a means of circumscribing § 2244(b).

As relevant to habeas cases, under Rule 60(b)(5) relief from judgment may be granted where "it is no longer equitable that the judgment should have prospective application." The clause requires that there is "a significant change either in factual conditions or in law. . . . [and] [a] court may recognize subsequent changes in either statutory or decisional law." Agostini v. Felton, 521 U.S. 203, 215 (1997) (internal citation and quotation marks omitted); see also Polites v. United States, 364 U.S. 426, 438 (1960) (Brennan, J., dissenting) ("The decisions under Rule 60(b)(5) (adopted by the 1948 amendments to the Federal Rules of Civil Procedure) continue this history of equitable adjustment to changing conditions of fact and law."). Rule 60(b)(5) has been invoked in habeas cases to seek reconsideration based upon an intervening change of law. See, e.g., Phelps v. Alameda, 366 F.3d 722, 724 (9th Cir. 2004); Hess v. Cockrell, 281 F.3d 212, 214 (5th Cir. 2002).

Rule 60(b)(6) permits reopening a final judgment for "any other reason" exclusive of the bases for relief under clauses (1)-(5). The provision has been referred to as "a 'grand reservoir of equitable powers to do justice in a particular case.'" 12 Moore, § 60.48[1] (internal citation omitted). Both statutory interpretation and new decisional law provide fertile ground for seeking reconsideration of habeas denials that were based upon a circuit court's different understanding of AEDPA's provisions or a state court's procedural rules, or any change in this Court's constitutional jurisprudence. See, e.g., Hess, 281 F.3d at 214 (change in circuit decisional law); Lopez v. Douglas, 141 F.3d 974, 975 (10th Cir.) (citing Cooper v. Oklahoma, 517 U.S. 348 (1996)),

---

[15] Moreover, though the postjudgment motion is not a substitute for an appeal, Fackelman v. Bell, 564 F.2d 734, 735 (5th Cir. 1977), to the extent that Rule 60(b)(1) is available in a habeas proceeding, it effectively would provide such a mechanism. Issues that should have been the subject of an appeal, including for example, whether the district court properly applied a procedural bar or rejected petitioner's claim for equitable tolling, could be raised as excusable neglect or inadvertence on petitioner's part or mistake by the district court. Thus whether COA was granted on any one of those issues, availability of Rule 60(b)(1) would provide a petitioner with no less than one opportunity for reconsideration. Similarly, Rule 60(b)(1) could be used to evade compliance with Rule 4(a)(5) of the Federal Rules of Appellate Procedure. Compare Dunn v. Cockrell, 302 F.3d 491, 492 (5th Cir. 2002), cert. denied, 537 U.S. 1181 (2003).

cert. denied, 525 U.S. 1024 (1998); Gee v. Shillinger, 1998 U.S. App. LEXIS 2644 (10th Cir. Feb. 18, 1998) (unpublished) (citing Schlup v. Delo, 513 U.S. 298 (1995)); Cornell v. Nix, 119 F.3d 1329, 1330-1331 (8th Cir. 1997) (same). To suggest otherwise, see Brief of Amicus Curiae Abu-Ali Abdur'Rahman, at 4-5, ignores such current practice and the impact that a "go ahead" from this Court will create, as well as the reality of the abuses associated with habeas litigation that Congress sought to curtail - both specific to capital litigation presenting abusive delay tactics, see Mercer v. Armontrout, 864 F.2d 1429, 1433 (8th Cir. 1988), as well as with non-capital cases where petitioners have zero incentive not to repetitively seek relief, and the impact that delayed relief has on the state's ability to retry a case. See Herrera v. Collins, 506 U.S. 390, 403 (1993) ("[T]he passage of time only diminishes the reliability of criminal adjudications.") (citing and quoting McClesky v. Zant, 499 U.S. 467, 491 (1991)). Given the passage of time and the loss of petitioner's guilty plea transcript, this case serves as a prime example.

Attempts to circumvent AEDPA also exist where a Rule 60(b) motion has been filed at the same time that a § 2244(b) request has been made, Rodwell v. Pepe, 324 F.3d 66, 68-69 (1st Cir.), cert. denied, 540 U.S. 873 (2003); United States v. Rich, 141 F.3d 550, 551 & n.1 (5th Cir. 1998), cert. denied, 526 U.S. 1011 (1999); Fierro v. Johnson, 197 F.3d 147, 150 (5th Cir. 1999), cert. denied, 530 U.S. 1206 (2000), with a motion to recall the mandate, Scott v. Singletary, 38 F.3d 1547, 1548 (11th Cir. 1994), cert. denied, 515 U.S. 1145 (1995), and after an unsuccessful appeal. Alley v. Bell, 392 F.3d 822, 826 (6th Cir. 2004). Each result in an unchecked abuse of the process.

Petitioner's own argument demonstrates the precise manner in which Rule 60(b) contravenes AEDPA. Petitioner contends that a habeas petitioner who previously had one round of habeas proceedings, having raised a challenge to a death sentence based upon mental retardation, could not subsequently reassert the claim citing Atkins v. Virginia, 536 U.S. 334 (2002), whereas those who

either had not previously brought a federal petition or those who did not raise the claim in the first petition could. Pet.Br. at 42. Petitioner would have the Court allow Rule 60(b) motions to raise a challenge to the underlying state judgment. Such a claim does not pertain to how the habeas petition was previously decided. And see infra, at 24-25. To the extent that petitioner would suggest a new rule of constitutional law renders the original habeas proceeding infirm, use of the rule nonetheless conflicts with § 2244(b). Congress established the circumstances for raising a change in law. § 2244(b)(2). That petitioner could not meet those requirements does not, however, leave him without recourse: a number of states provide a mechanism for the filing of successive collateral relief,[16] as well as a specific process with respect to new rules of constitutional law respecting the constitutionality of the death penalty.[17] In addition, if the state process were held insufficient, such a claim would likely be entertained as an original petition. See Felker, 518 U.S. at 664-665; see also Herrera, 506 at 417 (assuming that habeas relief would be warranted in a case where "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional" "if there were no state avenue open to process such a claim."). The same would likely apply to a successive claim raised under Roper v. Simmons, 125 S.Ct. 1183 (2005).

Despite the antagonistic goals of Rule 60(b) and § 2244(b), see 12 Moore, § 60.40, citing the dissent in this Court's dismissal

---

[16] See, e.g., State v. Bonnell, 831 P.2d 434 (Ariz. Ct. App. 1992); Colo. Crim. P. 35(VI) & (VII) (2005); Thompson v. State, 887 So. 2d 1260, 1263 (Fla. 2004); 725 ILCS 5/122-1(2)(f) (2004); Cox v. State, 522 P.2d 173 (Kan. 1974); Mich. Ct. R. 6.502(a)(2) (2005); Miss. Code Ann. § 99-39-23(6); Wis. Stat. § 974.06(1) & (4) (2004).

[17] See, e.g., Code of Ala. § 13A-5-59 (2004); Colo. Rev. Stat. § 18-1.3-401(5) (2004); Fla. Stat. § 775.082(2) (2004); Miss Code Ann. § 99-19-107 (2004); Mo. Rev. Stat. § 565.040 (2004); Nev. Rev. Stat. § 176.555 (2004); N.M. Stat. Ann. § 31-18-14B (2005); Okla. Stat. § 701.15 (2004); S.D. Codified Laws § 23A-27A-14 (2003); Utah Code Ann. § 76-3-207(7) (2004); Wash. Rev. Code § 10.95.090 (2004).

in Abdur'Rahman v. Bell, 537 U.S. 88, 94 (2002) (Stevens, J., dissenting) and Judge Tjoflat's dissent in part below, J.A. 89-91, Pet.Br. at 18-19, petitioner argues that there is a functional difference between the two provisions supporting treating a Rule 60(b) motion as distinct from a successive petition. Id. at 17-29. He argues the civil rule aims at remedying problems in the habeas adjudication, whereas a second or successive petition is an attack on the underlying conviction and/or sentence. This is a distinction without a difference, putting form over substance.

This so-called distinction is easily manipulated as a matter of semantics to circumvent § 2244(b), revealing that a Rule 60(b) motion is in practice equivalent to a second or successive petition.[18]

---

[18] A Rule 60(b) motion is filed

(1).- reasserting petitioner's claim brought in his denied habeas petition that his death sentence was unconstitutional because trial counsel rendered ineffective assistance based upon his failure to investigate petitioner's psychiatric history; or - asserting that the district court neglected to apply Wiggins v. Smith, 539 U.S. 510 (2003), did so erroneously, or misapplied § 2254(d), thereby improperly considering petitioner's claim of ineffective assistance and that the denial of the habeas petition should be reopened as a result.

(2).- reasserting petitioner's claim brought in his denied habeas petition that his conviction was unconstitutional under Batson v. Kentucky, 476 U.S. 79 (1986); or - asserting that the district court mistakenly applied 28 U.S.C. § 2254(e)(2), determined that petitioner was not entitled to an evidentiary hearing, and neglected to look to the facts cited by petitioner, thereby erroneously considering the Batson claim and therefore that the denial of the petition should be reopened;

(3).- reasserting petitioner's claim brought in his denied habeas petition that his conviction was unconstitutional as the result of counsel's failure to present evidence of an alibi defense; or - asserting that the habeas proceedings were inadequate because the district court did not have before it evidence of petitioner's alibi defense.

Thus based upon how the postjudgment motion is worded, the Rule 60(b) motions in each example seemingly have distinct objectives - the former seeking review of the underlying conviction, while the latter identifies an error in the habeas adjudication as the basis for reconsideration.

In In re Abdur'Rahman, 392 F.3d 174 (6th Cir. 2004) (en banc), the Sixth Circuit's majority decision implicitly acknowledged as much, providing that "[i]t is only when a petitioner presents a *direct challenge* to the constitutionality of the underlying conviction that the petition should be treated as a second or successive habeas petition." Id. at 181 (emphasis added). In its attempt to identify "true" Rule 60(b) motions, the so-called functional approach advocated by petitioner and amicus recognizes that a successive petition can be disguised as a Rule 60(b) motion. See Pet.Br. at 19; Brief of Abu-Ali Abdur'Rahman, at 20-21. Each, however, fails to address the fact that this disguise is premised on the very basis they advocate for treating the rule and statute as distinct, i.e., language challenging the manner in which the habeas court denied the petition. Moreover, because the ultimate relief sought is readjudication of the basis for which the petition was denied, there is no meaningful difference between the relief sought whether raised in a Rule 60(b) motion or as a successive petition. The only difference is whether the more forgiving standard under Rule 60(b) will permit the reconsideration that § 2244(b)(1) would preclude.

As recognized in Engle v. Isaac, 456 U.S. 107 (1982), the writ entails significant costs: undermining finality of state criminal proceedings by depriving both society and the accused of "the certainty that comes with an end to litigation"; rendering ineffective the judicial system; the loss of deterrence, rehabilitation, and punishment; and infringement of the states' right to enforce its criminal laws. Id. at 127-128; see also Withrow v. Williams, 507 U.S. 608, 698-699 (1993) (O'Connor, J., dissenting) ("[W]e repeatedly have recognized that collateral attacks raise numerous concerns not present on direct review. Most profound is the effect on finality."). It cannot reasonably be argued that the unqualified application of Rule 60(b) does not require disregard for the statutes and rules governing habeas corpus and this Court's jurisprudence in the area, as well as interfere with finality of judgments. See Liljeberg, 486 U.S. at 873 (Rehnquist, C.J., dissenting). And because a civil action typically does not involve review of another court's adjudication, the lack of finality occasioned by use of Rule

60(b) is an even greater affront to AEDPA, as habeas corpus effectively does amount to review of the state court judgment for which the state prisoner is held in custody. See Coleman v. Thompson, 501 U.S. 722, 730 (1991) (addressing the effect of ignoring application of independent and adequate state grounds and granting habeas relief).

Rule 60(b), with the exception of clause (3), provides a means by which a habeas petitioner, whether ultimately successful or not, can avoid the procedural requirements for obtaining review under AEDPA. Sanctioning this practice would unjustifiably invalidate this Court's long-held recognition that federal habeas corpus is different from general civil litigation. Browder, 434 U.S. at 269; Harris, 394 U.S. at 293-294. Indeed, "the Court has performed its statutory task [in defining the scope of the writ] through a sensitive weighing of the interests implicated by federal habeas corpus jurisdiction of constitutional claims determined adversely to the prisoner by the state courts." Kuhlmann v. Wilson, 477 U.S. 436, 447-448 (1986). Blanket availability of Rule 60(b) to habeas proceedings contravenes this Court's habeas jurisprudence and renders the paramount weight Congress gave to the states' interest in finality, as balanced through the promulgation of AEDPA, nugatory.

C. Rule 81(a)(2) of the Federal Rules of Civil Procedure and Rule 11 of the Rules Governing Section 2254 Cases mandate the limited applicability of Rule 60(b) in habeas cases.

The rules of civil procedure are not automatically applicable to habeas proceedings. Schlanger v. Seamans, 401 U.S. 487, 490 n.4 (1971). Nor may a court ignore statutes, rules, and precedent specific to habeas corpus in favor of general equitable principles. Lonchar, 517 U.S. at 323. Under Rule 11 of Rules Governing Section 2254 Cases, "[t]he Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be

applied, when appropriate, to petitions filed under these rules."[19] Accord Fed.R. Civ.P. 1; 81(a)(2) (quoted supra, at 2). As the foregoing discussion demonstrates, Rule 60(b) as a general rule of civil procedure is inconsistent with § 2244(b) under AEDPA. 28 U.S.C. § 2254, Rule 11 thus mandates its application be limited except in the narrowest of circumstances. Cf. Rhines, 2005 U.S. LEXIS 2930 *13-14 ("Any solution to this problem [arising from the 1-year limitation requirement and the lack of exhaustion dismissal rule] must therefore be compatible with AEDPA's purposes.").[20]

---

[19] Effective December 1, 2004, Rule 11 was amended and provides as follows: "The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules." Pursuant to the Advisory Committee's notes, the amendment "is intended to be stylistic and no substantive change is intended."

[20] Compare infra, at 39-40 (distinguishing Rule 60(b)(3)). Nor does Castro v. United States, 540 U.S. 375 (2003) call for a different result. Castro is not implicated when a court recognizes that a pleading designated a "Rule 60(b) motion" in a federal habeas corpus proceeding is a challenge to a prior determination that relief will not be granted upon claims raised in a habeas petition, and thus rejected for failure to comply with § 2244(b). Limiting Rule 60(b) is not analogous to recharacterizing a pleading as either a § 2254 petition or a § 2255 motion; the Eleventh Circuit did not deprive petitioner of "'the right to have a single petition for habeas corpus adjudicated.'" Adams v. United States, 155 F.3d 582, 584 (2nd Cir. 1998).

> This restriction on re-characterizing post-conviction motions does not apply, however, to a federal court's re-characterization of a prisoner's second or successive motion which collaterally challenges his conviction or sentence in the sentencing court. *See Melton v. United States*, 359 F.3d 855, 857-58 (7th Cir. 2004); *Gonzalez v. Secretary for Dept. of Corrections*, 366 F.3d 1253, 1277 n.10 (11th Cir. 2004).

Ingrati v. United States, 2004 U.S. Dist. LEXIS 13492 *6-7 (D. Del. Jul. 14, 2004) (unpublished).

Consideration, and when warranted, restriction of the applicability of the rules of civil procedure in the habeas corpus context is not foreign to this Court:

In Harris v. Nelson, 394 U.S. 286 (1969), the Court addressed the issue "whether state prisoners who have commenced habeas corpus proceedings in a federal district court may, in proper circumstances, utilize the instrument of interrogatories for discovery purposes." Id. at 288. The petitioner there had relied upon Rule 33 of the Federal Rules of Civil Procedure. Id. at 289. The Court first rejected the notion that habeas corpus as a "civil" proceeding is equivalent to other civil actions. Id. at 294 ("Habeas corpus practice in the federal courts has conformed with civil practice only in a general sense."). Applying Rule 81(a)(2), the Court interpreted the requirement that for the rules to apply under § 2254, habeas practice must have conformed to the rules. Id. "Otherwise, those proceedings were to be considered outside of the scope of the rules without prejudice, of course, to the use of particular rules by analogy or otherwise, where appropriate." Id. (footnote omitted). In rejecting the contention that the broad provision for discovery under Rule 33 applies to habeas proceedings, the Court looked to the intent of the Rules' draftsmen, finding that there was "a general and nonspecific understanding that the rules would have very limited application to habeas corpus proceedings." Id. at 295. Petitioner fails to address Harris.

The Court next took up the issue of the applicability of the civil rules in habeas proceedings in Pitchess v. Davis, 421 U.S. 482 (1975). There, the habeas petitioner filed a motion requesting that the district court modify its conditional writ and replace it with an absolute writ and enjoin the state from retrying petitioner, based upon the destruction of certain evidence. Id. at 485. In affirming the grant of relief by the district court, the court of appeals concluded that petitioner's motion was proper under Rule 60(b), and thus the fact that he failed to exhaust the claim raised therein was irrelevant. Id. at 489. Applying Rule 81(a)(2), and without deciding whether Rule 60(b) applied to habeas proceedings, this

Court reversed on the basis that the exhaustion requirement is statutorily codified under §§ 2254(b) and (c) and thus applies. Id. Petitioner makes no mention of Pitchess.

Lastly, in Browder v. Director, Dept. of Corrections, 434 U.S. 257 (1978), the Court considered "the applicability of Fed.Rules Civ.Proc. 52(b) and 59 in habeas corpus proceedings." Id. at 258.[21] In Browder, the district court granted the writ of habeas corpus; the state did not file a timely motion for new trial under Rule 52 or a timely motion to alter or amend under Rule 59 that would have tolled the time for filing a notice of appeal under F.R.A.P. 4(a). Accordingly, the court of appeals was without jurisdiction over the state's appeal. Id. at 264-265. Respondent there argued that the federal civil procedure rules were "wholly inapplicable on habeas." Id. at 269.[22] In concluding that Rule 81(a)(2) did not preclude application of Rules 52 and 59 under the circumstances, the Court found determinative that

> [n]o other statute of the United States is addressed to the timeliness of a motion to reconsider the grant or denial of habeas corpus relief, and the practice in habeas corpus proceedings before the advent of the Federal Rules of Civil Procedure conformed to the

---

[21] To the extent that petitioner relies upon Browder for the proposition that Rule 60(b) does apply in habeas cases, see Pet.Br. at 10, the issue was not before the Court and thus was not decided. See Browder, 434 U.S. at 263 n.8 ("In any event, since respondent has represented to the Court of Appeals and to this Court that his motion was not based on Rule 60(b), and since the District Court did not construe it as such, we find it unnecessary to address the question whether the decision of the Court of Appeals could be sustained on the theory that despite the absence of any reference to Rule 60(b) or any of its specified grounds, the action of the District Court was reversible as an improper denial of relief under that Rule.").

[22] Respondent does not take such an extreme position, instead asserting that the Rules apply to the extent that they do not conflict with habeas statutory provisions or rules specific to § 2254 proceedings. See supra, at 26-32.

practice in other civil proceedings with respect to the correction or reopening of a judgment.

Id. at 270.[23]

Harris, Pitchess, and Browder establish that under certain circumstances the civil rules should not be applied to habeas corpus proceedings. In making that determination, the writ's statutory provisions and rules may not be ignored in favor of equity, Lonchar, 517 U.S. at 323, though urged by amicus Office of the Federal Public Defender for the Middle District of Tennessee, at 2-7. Specific to Rule 60(b), Pitchess stands for the proposition that, to the extent that the rule does apply, it is confined by habeas practice as reflected in habeas statutes, rules, and this Court's jurisprudence. And Browder does not warrant wholesale application of Rule 60(b); in the case of Rules 52 and 59, because the district court's judgment is not deemed final until the 10-day period following entry of judgment has expired, it would defy logic to argue that those rules somehow contravene § 2244(b). Because Rule 60(b) seeks reconsideration of a final adjudication, thereby implicating the balancing of interests made by Congress in its promulgation of § 2244(b), the same cannot be said. Cf. Zimmer St. Louis, Inc. v. Zimmer Co., 32 F 3d 357, 360-361 (8th Cir. 1994) (rejecting application of Rule 60(b) to open judgment to restart running of period to file an appeal, in light of 1991 amendments to F.R.A.P. 4(a)).[24] To permit the use of Rule 60(b) to relitigate the

---

[23] As discussed supra, at 12-15, AEDPA has changed that practice.

[24] Applying those principles, a number of circuit courts have also considered the extent that the civil rules apply in habeas proceedings. See, e.g., Martinez v. Johnson, 104 F.3d 769, 772 (5th Cir.) (Fed.R. Civ.P. 41(b) does not conflict with the habeas rules), cert. denied, 522 U.S. 875 (1997); McBride v. Sharpe, 25 F.3d 962, 969-970 (11th Cir.) (en banc) (while Rule 56(c)'s notice provision is applicable in habeas cases in certain circumstance, it was held inapplicable where materials outside of the record were not relied upon), cert. denied, 513 U.S. 990 (1994); United States ex rel. Stachulak, 520 F.2d 931, 933-934 (7th Cir. 1975) (Rule 54(b) not applicable to habeas proceedings where claims seeking both habeas and non-habeas relief were joined), cert. denied, 424

denial of habeas relief on any basis other than a fraud perpetrated upon the district court is to "destroy[] the balance created by" Congress. See 12 Moore, §60.48[6][c].[25]

U.S. 947 (1976).

[25] Petitioner contends however, that for this Court to uphold the Eleventh Circuit's treatment of Rule 60(b) raises "grave and doubtful constitutional questions." Pet.Br. at 32. Petitioner seeks, Pet.Br. at 25-36, to raise an issue not before the lower court. Petitioner failed to properly present the argument below as now made before this Court, instead addressing the Suspension Clause in the context of his due process argument, disavowing any relevance there. En banc Brief of the Appellant, at 27 n.5. Nor was the issue before or decided by the court of appeals. For the same reasons, the second question as presented and argued here by the National Association of Criminal Defense Lawyers, at 23-27, is not properly before this Court. And in respect to petitioner's contention that due process precludes treatment of a Rule 60(b) motion as a successive petition, the same is true. Petitioner apparently believes, however, that it is sufficient that he cited those constitutional provisions under Question 1 in his petition for writ of certiorari, see Cert. Pet. at 17, and relied upon case law that made reference to the Suspension Clause, see id. at 17-19, notwithstanding the order excluding review of Question 2, which presented the issues that petitioner now also relies. The Court has repeatedly held that it will not decide questions improperly before it. Yee v. City of Escondido, 503 U.S. 519, 536-537 (1992).

Additionally, if the issue is before the Court, petitioner's Suspension Clause claim is foreclosed by Felker, 518 U.S. at 658, 664. Just as "[t]he added restrictions which the [Anti-Terrorism and Effective Death Penalty] Act places on second habeas petitions are well within the compass of this evolutionary process, ...", id., 518 U.S. at 664, the same holds true for the limitation period under § 2244(d). Prior to passage of AEDPA, this Court and Congress provided for the dismissal of delayed petitions. See Rule 9(a) of the Rules Governing Section 2254 Cases. That Congress altered the criteria for determining whether a petition was subject to denial as time-barred is simply another example of "a balancing of objectives (sometimes controversial), which is normally for Congress to make, ..." Lonchar, 517 U.S. at 323. And respecting petitioner's reliance upon the fact that it was his first petition that was dismissed, Pet.Br. at 39, he presupposes that the proper application of the law as it stood at the time of adjudication resulting in dismissal constitutes a retroactive suspension of the writ upon a subsequent interpretation of the statute because it might have provided for a different result. As discussed infra, at 40 n.33, there is no basis for such an argument. Similarly, in respect to his due process claim, petitioner fails to cite any precedent for the proposition that procedure due process - i.e., the

Moreover, limiting application of Rule 60(b) in light of AEDPA's § 2244(b) is consistent with those cases holding prior to the enactment of AEDPA that a Rule 60(b) motion could not be used to avoid application of the abuse of the writ doctrine.[26] The pre-AEDPA decisions applied Rule 9(b) of the Rules Governing Section 2254 Cases (effective 1977), which incorporates the Court's prior decisions on successive petitions and abuse of the writ. Slack, 529 U.S. at 486. Thus, petitioner's reliance upon cases failing to take such account is inapposite. See Pet.Br. at 11-12.[27]

---

right to notice and an opportunity to be heard, Hamdi v. Rumsfeld, 124 S.Ct. 2633, 2648-2649 (2004) - is violated if, following argument by the parties, a court applies controlling law at the time the case is decided.

[26] See, e.g., Hunt v. Nuth, 57 F.3d 1327, 1339 (4th Cir. 1995), cert. denied, 516 U.S. 1054 (1996); Jones v. Murray, 976 F.2d 169, 173 (4th Cir. 1992), cert. denied, 505 U.S. 1245 (1993); Williams v. Whitley, 994 F.2d 226, 230 n.2 (5th Cir.), cert. denied, 510 U.S. 1014 (1993); McQueen v. Scroggy, 99 F.3d 1302, 1335 (6th Cir. 1996), cert. denied, 520 U.S. 1257 (1997), overruled on other grounds, In re Abdur'Rahman, 392 F.3d 174 (6th Cir. 2004) (en banc); Gant v. United States, 1993 U.S. App. LEXIS 26819 *2-3 (7th Cir. Oct. 5, 1993) (unpublished), cert. denied, 510 U.S. 1183 (1994); Blair v. Armontrout, 976 F.2d 1130, 1134 (8th Cir. 1992), cert. denied, 508 U.S. 916 (1993); Bonin v. Vasquez, 999 F.2d 425, 428 (9th Cir. 1993); Lindsey v. Thigpen, 875 F.2d 1509, 1511-1512, 1515 (11th Cir. 1989).

[27] In addition, petitioner's citation to cases where the state sought Rule 60(b) relief, including Booker v. Singletary, 90 F.3d 440 (11th Cir. 1996) and Ritter v. Smith, 811 F.2d 1398 (11th Cir.), cert. denied, 483 U.S. 1010 (1987), are irrelevant, as the state does not file a habeas petition and thus is not governed by § 2244(b). Obviously, then, a state's motion for reconsideration does not conflict with AEDPA as the same considerations are not implicated.

II.

A Rule 60(b) motion challenging the non-technical procedural denial of habeas corpus relief seeks review of the merits of the adjudication of that petition.

A. Denial of a petition for writ of habeas corpus as time-barred, unlike, for example, a dismissal for lack of exhaustion, for a premature claim, or failure to properly complete the requisite habeas form, is not a technical defect but constitutes a judgment on the merits.

In Stewart v. Martinez-Villareal, 523 U.S. 637 (1998), the Court held that a habeas petition dismissed without prejudice because the claim was premature did not constitute adjudication of the claim to preclude its reassertion. Id. at 644-645. Similarly, in Slack v. McDaniel, 529 U.S. 473 (2000), a dismissal without prejudice because the substantive claims had not been exhausted in state court did not constitute a ruling on the merits such that their reassertion would be successive. Id. at 486-487. Therefore, in circumstances where procedural dismissals were disposed upon technical grounds, the rulings did not preclude consideration of those same claims at some future time.[28]

---

[28] See also Sanders v. United States, 373 U.S. 1, 19 (1963) (dismissal based upon deficient pleading did not bar subsequently filed § 2255 petition). Other examples of technical procedural dismissals include, for example, failure to comply with the pleading form (28 U.S.C. § 2254, Rule 2(c)), lack of jurisdiction, failure to pay the filing fee or to file for in forma pauperis status (28 U.S.C. § 2254, Rule 3), or a withdrawn petition. See Singleton v. Norris, 319 F.3d 1018, 1023 (8th Cir.) (en banc) (later petition not barred under § 2244(b) because competency to be executed claim did not arise until scheduling of execution and involuntary medication order), cert. denied, 540 U.S. 832 (2003); Turner v. Terhune, 78 Fed. Appx. 29, 30 (9th Cir. Sept. 8, 2003) (unpublished) (first petition dismissed for failure to name the state custodian, thus not a bar to filing a later petition); Barnes v. Briley, 43 Fed. Appx. 969, 973 (7th Cir. Jul. 10, 2002) (unpublished) (failure to pay $5.00 filing fee "at the purely technical end

Those circumstances are, of course, quite distinct from an adjudication finally disposing of a petition. The Court's opinions in Stewart and Slack recognize by strong implication that not every adjudication of a habeas petition on procedural grounds is "on the merits." Otherwise the Court need not have identified the procedural dismissals as "technical." Had the Court intended otherwise, all adjudications resulting in a dismissal on procedural grounds, without distinction, would not implicate § 2244(b) for lack of a merits determination. The basis for the distinction is this: while a technical procedural defect in a habeas proceeding can be remedied and anticipates subsequent litigation upon the same claims, a denial on non-technical procedural grounds forever forecloses litigation of those underlying claims. Plaut, 514 U.S. at 228 ("The rules of finality, both statutory and judge made, treat a dismissal on statute-of-limitations grounds the same way they treat a dismissal for failure to state a claim, for failure to prove substantive liability, or for failure to prosecute: as a judgment on the merits."); cf. Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 502-506 (2001) (in federal civil proceeding based upon diversity jurisdiction, dismissal on state statute of limitations grounds constituted a "judgment on the merits" barring refiling of same claim in federal district court, while res judicata would not preclude refiling of the claim in state court).

Accordingly, a judgment on the merits results whether it be a determination that the underlying constitutional claims are not subject to review due to a non-technical procedural ground, e.g., the petition is time-barred or the claims are procedurally defaulted, or that the underlying claims were substantively reviewed and denied. Both types of rulings are final dispositions of the habeas petition that give rise to appellate jurisdiction (assuming the filing of a timely notice of appeal and issuance of a certificate of

---

of the spectrum. . . ."); see also Jeffrey, Article: Successive Habeas Corpus Petitions And Section 2255 Motions After The Antiterrorism And Effective Death Penalty Act Of 1996: Emerging Procedural And Substantive Issues, 84 Marq. L.Rev. 43, 73-91 (2000).

appealability). Conversely, a dismissal on a technical procedural basis does not provide for appellate review. Moore v. Mote, 368 F.3d 754, 755 (7th Cir. 2004) ("The district court's order dismissing the case without prejudice is not final because it explicitly contemplates the court's continuing involvement in the case. . . ."); see also Hunt v. Hopkins, 266 F.3d 934, 936-937 (8th Cir. 2001) (circuit court was without appellate jurisdiction of district court's order permitting habeas petitioner to file a third amended petition; while second petition was dismissed, the action was not). It is this distinction between the effect of technical as compared to non-technical dispositions of habeas petitions that explains the Court's decisions in Stewart and Slack and renders petitioner's reliance upon those opinions in support of his position misplaced.[29] See Pet.Br. at 29.

The Eleventh Circuit's treatment of petitioner's Rule 60(b) motion is true to the rationale underlying Slack and Stewart. Moreover, Gonzalez is consistent with both pre-AEDPA and post-AEDPA cases holding that the denial or termination of a habeas petition on procedural default grounds is a ruling on the merits for purposes of evaluating whether a subsequent pleading is a successive petition.[30] See, e.g., Harvey v. Horan, 278 F.3d 370, 379-380 (4th Cir. 2002); In re: Cook, 215 F.3d 606, 607-608 (6th Cir.

---

[29] Neither Slack nor Stewart were before the Court from an appeal that the district court had disposed of the petitions as unripe or for lack of exhaustion. Instead, Slack's subsequent habeas petition had been dismissed as an abuse of the writ. Slack, 529 U.S. at 478-479. In Stewart, the state sought a writ of certiorari after the circuit court held that § 2244(b) did not apply to Stewart's claim under Ford v. Washington, 477 U.S. 399 (1986) that had previously been dismissed and remanding the case back to the district court. Stewart, 523 U.S. at 640-641.

[30] Because an actual statute of limitations period did not apply to habeas corpus proceedings prior to enactment of AEDPA, there obviously would not exist case law specific to § 2254 holding that a denial of habeas petition as time-barred is a ruling on the merits for purposes of whether a new petition is successive.

2000);[31] Carter v. United States, 150 F.3d 202, 205-206 (2nd Cir. 1998); Caton v. Clarke, 70 F.3d 64, 65 (8th Cir. 1995), cert. denied, 517 U.S. 1173 (1996); Hawkins v. Evans, 64 F.3d 543, 547 (10th Cir. 1995); Bates v. Whitley, 19 F.3d 1066, 1067 (5th Cir. 1994); Howard v. Lewis, 905 F.2d 1318, 1322-1323 (9th Cir. 1990).[32]

---

[31] The majority in In re Abdur'Rahman, 392 F.3d 174 (6th Cir. 2004) (en banc) failed to address this principle that a denial on procedural grounds is a final adjudication and its own precedent so holding, see In re Cook, 215 F.3d at 608, instead citing Cook solely for the proposition that an unexhausted claim is deemed procedurally defaulted where the petitioner cannot return to state court to properly exhaust the claim. In re Abdur'Rahman, id., at 186.

[32] Petitioner, however, relies upon cases reaching a contrary result, Pet.Br. at 28-30, notwithstanding that those cases take no account of the distinction between a technical procedural dismissal versus a non-technical procedural denial of the petition, thus failing to treat the latter as an adjudication on the merits of the petition. See, e.g., In re Abdur-Rahman, 392 F.3d 174 (6th Cir. 2005) (en banc) (the majority gave no consideration to this Court's decisions in Calderon, Slack, or Stewart); Guyton v. United States, 23 Fed. Appx. 539 (7th Cir. Sept. 26, 2001) (unpublished) (discussing the issue in dicta); Blackmon v. Money, 27 Fed. Appx. 543 (6th Cir. Dec. 10, 2001) (unpublished) (successive issue not addressed by the court). Petitioner also cites district court decisions for the proposition that they "have also followed the precedent of this Court's analytical formulation." Pet.Br. at 29-30. To the contrary, those decisions necessitate the opposite result in light of this Court's opinion in Calderon, as the principle opinion of those cases relied upon pre-Calderon case law and approved the use of Rule 60(b) as analogous to a federal appellate court's power to recall its mandate, Tal v. Miller, 1999 U.S. Dist. LEXIS 652 *3 (S.D.N.Y. Jan. 27, 1999) (unpublished), while the others specifically relied upon the reasoning in Tal. See Devino v. Duncan, 215 F.Supp.2d 414, 418 (S.D.N.Y. 2002); Reinoso v. Artuz, 1999 U.S. Dist. LEXIS 7768 *5 (S.D.N.Y. May 25, 1990) (unpublished); Robles v. Senkowski, 1999 U.S. Dist. LEXIS 11565 *4-5 (S.D.N.Y. Jul. 30, 1999) (unpublished); see also Vega v. Artuz, 2002 U.S. Dist. LEXIS 17204 *10-13 (S.D.N.Y. Sept. 12, 2002) (unpublished) (propriety of Rule 60(b) motion based upon equity). Other opinions similarly decided suffer from the same analytical failing. See Pridgen v. Shannon, 380 F.3d 721 (3rd Cir. 2004) (no reference made to Calderon, Slack, or Stewart), cert. denied, 2005 U.S. LEXIS 1587 (Feb. 22, 2005); Hamilton v. Newland, 374 F.3d 822, 825 (9th Cir. 2004) (broadly asserting that "Rule 60(b) is the appropriate rule to invoke when one wishes a court to *reconsider claims it has already decided*.") (emphasis added)), cert. denied, 2005 U.S. LEXIS 2307 (Mar. 7, 2005); compare Muniz v. United States, 236 F.3d 122, 128 (2nd Cir. 2001) (in applying Slack, the court

B. A Rule 60(b) motion seeking review of the denial of habeas corpus relief on a non-technical procedural basis is the functional equivalent of a successive petition, barred under § 2244(b)(1).

An adjudication that the underlying constitutional claims are not subject to review, now or in the future, is a denial on non-technical grounds and thus an adjudication on the merits. Any subsequent petition attempting to raise the same constitutional claims challenging the state court judgment of conviction and sentence would be successive, for the reason that the new petition is one seeking to relitigate the disposition of the same claims raised in a previous petition determined to foreclose future consideration of those claims. See Kuhlmann, 477 U.S. at 445 n.6 (citing Sanders, 373 U.S. at 15-17). Section 2244(b)(1) as amended clearly precludes this. To permit a habeas petitioner to evade that result through use of a Rule 60(b) motion is in clear contravention of the statutory scheme.

In addition to pre-AEDPA treatment of non-technical habeas adjudications and subsequent petitions, supra, at 32 & n.26, Congress' amendment to § 2244(b) removes any doubt that a denial of a habeas petition does not require that adjudication of the underlying constitutional claims must be "on the merits." Formerly § 2244(b) provided in pertinent part:

> When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody

---

treated a dismissal pursuant to § 2244(d) as a "technical procedural" defect because the dismissal was deemed erroneous based upon a contrary subsequent interpretation of the limitation statute, and also expressing as a particular concern that the habeas petitioner, through filing an application for a certificate of appealability, had sought a timely appeal asserting an erroneous determination under § 2244(d), wherein application of two decisions that had been released by the appellate court *after the petition was dismissed but within the time for appeal* would have resulted in the petition being deemed timely filed).

> pursuant to the judgment of a State court has been denied by a court of the United States . . . release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus on behalf of such person need not be entertained . . . unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ. . . .

28 U.S.C. § 2244(b) (1994). As amended by AEDPA, § 2244(b) excludes all reference to a merits determination of a material factual issue, providing that "[a] claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." § 2244(b)(1). Similarly, Rule 9 of the Rules Governing Section 2254 Cases, amended effected December 1, 2004, also reflects this change: Rule 9 no longer makes reference to whether "the prior determination was on the merits . . ." as was the case with Rule 9(b), now providing that "[b]efore presenting a second or successive petition, the petitioner must obtain an order from the appropriate court of appeals authorizing the district court to consider the petition as required by 28 U.S.C. § 2244(b)(3) and (4)."

Moreover, had Congress intended otherwise, either the statute of limitations would not have been created and the procedural default doctrine would have been renounced, or the "one bite at the apple" would have included a qualification: except when the petition is denied for any reason but substantive review of the underlying constitutional claims. Congress took neither tack. Thus AEDPA requires "an adjudication of all the claims . . . ," Martinez-Villareal, 523 U.S. at 643, not substantive review of the claims raised by a habeas petitioner. To hold otherwise, i.e., if a non-technical procedural final disposition of a habeas petition does not implicate § 2244(b)(1), then a habeas petitioner could endlessly file the same petition previously denied as time-barred or that the claims were procedurally defaulted, hopeful that such judge-

shopping might ultimately result in relief, or at the least incur continuous delay. Cf. Rhines, 2005 U.S. LEXIS 2930 *16 (recognizing the potential for abuse of the stay and abeyance procedure in habeas litigation).

III.

A subsequent interpretation by this Court of the procedural rule upon which a lower court denied a habeas petition does not impinge the integrity of that lower court's judgment.

Unlike the case at hand, there are circumstances in which Rule 81(a)(2) and Rule 11 of the Rules Governing Section 2254 Cases do not dictate the inapplicability of Rule 60(b). The government's procurement of a judgment through fraud certainly would not qualify as the "one bite" at the habeas apple that Congress intended with passage of AEDPA. Cf. Abel v. Tinsley, 338 F.2d 514, 515-516 (10th Cir. 1964) (former habeas statutory provisions did not provide any procedure for relief from judgment the result of fraud; Rule 81(1)(2) did not preclude use of Rule 60(b)(3)). Perpetration of fraud upon the district court to defeat a petition for writ of habeas corpus impinges the integrity of the court. Integrity is not synonymous with mistaken or erroneous, but rather with "probity, honesty, and uprightness." Black's Law Dictionary 727 (5th ed. 1979). The judgment is not truly a judgment when the successful party engages in misrepresentations undetectable on the record, presents false testimony, or other unfair litigation tactics aimed at subverting the litigation process itself. See Schlesinger v. Councilman, 420 U.S. 738, 747 (1975) ("A judgment, however, is not rendered void merely by error . . . [I]t means only that for purposes of the matter at hand the judgment must be deemed without res judicata effect: because of lack of jurisdiction or some other equally fundamental defect, the judgment neither justifies nor bars relief from its consequences."); see also Hazel-Atlas Glass Co., 322 U.S. at 245 ("[W]here the occasion has

demanded, where enforcement of the judgment is 'manifestly unconscionable,' they [courts of equity] have wielded the power without hesitation.") (internal citation omitted).

Petitioner's case, however, does not present any such circumstance. Even if the district court decided petitioner's case based upon an understanding of § 2244(d)(2) that this Court's subsequent decision reflects was incorrect, a fact Respondent disputes,[33] at most the judgment would be deemed incorrect.

---

[33] Because petitioner's conviction became final well before the effective date of AEDPA, the one-year limitation period began running on April 24, 1996. While petitioner filed a state postconviction application on November 25, 1996, § 2244(d)(2) did not toll the limitation period: the collateral pleading was filed outside of the two-year limitation under Florida Rule of Criminal Procedure 3.850(b), and because the facts were previously known to petitioner, the untimely postconviction motion was not subject to any exception to otherwise render it timely filed. Drew, 297 F.3d at 1285 (citing Artuz, 531 U.S. at 9 n.2), cert. denied, 537 U.S. 1237 (2003). Thus, the pleading was not "properly filed" under § 2244(d)(2) and the one year continued to run from November 25, 1996 to April 23, 1997, when the limitation period ran. Petitioner's federal petition, filed on June 23, 1997, was untimely and properly denied as such. Petitioner's reliance upon Artuz in his Rule 60(b) motion simply was and remains inapplicable. But see infra, at 44.

Albeit petitioner argues that his petition would be deemed timely under Artuz, Pet.Br. at 14, he made no attempt to establish that before the Eleventh Circuit nor does so now before this Court. As demonstrated above, that simply is not the case. Nor does the fact that petitioner's first state Rule 3.850 motion was before the state courts from August 8, 1994 to February 8, 1995 effect the limitation period, as AEDPA had not yet been enacted. And to the extent that petitioner may believe that the period between the affirmance of the summary denial of the first collateral motion and the filing of the second is tolled under § 2244(d)(2), this Court has not so held. Compare Carey v. Saffold, 536 U.S. 214, 219-220 (2002) (for purposes of § 2244(d)(2), a petition is pending from the time of filing in the lower court through disposition of any appeal filed therefrom, i.e., final resolution).

Petitioner's contention that the lower courts erroneously denied his application for COA from the denial of his petition is also a misstatement. After having received a certificate of appealability from the district court that did not identify which, if any, issues petitioner had made a substantial showing of the

Petitioner touts a theme sounding in equity, arguing that for him to be bound by what was controlling Eleventh Circuit law at the time his habeas petition was adjudicated and finally determined is unfair. But as this Court has repeatedly pronounced, habeas corpus is governed by the statutes, rules, and precedent specific to habeas corpus; equitable considerations cannot and should not serve as a substitute. Lonchar, 517 U.S. at 323; Calderon, 523 U.S. at 554. The issue at hand is whether a general rule of civil procedure for which its purpose conflicts with habeas corpus may nonetheless be invoked for reconsideration of a judgment that was proper at the time it was rendered.

The integrity of that prior judgment is not implicated. Otherwise, if a judgment wrongly decided is sufficient to impinge the district court's integrity, see In re Abdur'Rahman, 392 F.3d at 180, then any decision would be subject to Rule 60(b) review, whether the disposition rested upon procedural or substantive resolution of the constitutional claims. Fraud necessitates some deliberate, wrongful conduct and simply is not equivalent to mistake, inadvertence, any other reason justifying relief, etc. Moreover, clause (b)(6) is not interchangeable with the others. Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership, 507 U.S. 380, 393 (1993). General allowance of Rule 60(b) thus contravenes § 2244(b)(1) by permitting reconsideration

---

denial of a constitutional right as mandated by 28 U.S.C. § 2253(c), returned by the Eleventh Circuit to the district court in an unpublished opinion dated October 28, 1999, under cause number 98-5545-FF, styled Aurelio O. Gonzalez v. Department of Corrections, the district court, on December 10, 1999, denied COA, simply reciting the standard of § 2253(c). J.A. 4. The order of the district court did not in any way indicate that the application would not be granted on the time-bar issue because it was a procedural denial rather than raising a constitutional issue. Nor would Eleventh Circuit precedent have precluded such review outright. Henry v. Department of Corrections, 197 F.3d 1361, 1364 (11th Cir. 1999). Petitioner did not thereupon seek a certificate of appealability from the court of appeals, but instead submitted to that court a "Petition for Rehearing" under cause number 98-5545-FF, on or about April 18, 2000, requesting reconsideration of the COA. With a letter dated April 26, 2000, that petition was returned to the petitioner having not been filed.

of the same claims and § 2253(b), because the petitioner need not obtain a certificate of appealability to receive additional review.

IV.

Retroactive application of a newly announced interpretation of a habeas procedural statute elevates the import of habeas procedure beyond that of new rules of constitutional law attendant to criminal procedure.

This Court's interpretation of § 2244(d), or any other statute for that matter, does not constitute an intervening change in the law. Rather, "[i]t is this Court's responsibility to say what a statute means, and *once the Court has spoken*, it is the duty of other courts to respect that understanding of the governing rule of law." Rivers v. Roadway Express, Inc., 511 U.S. 298, 312 (1994) (emphasis added). Thus, the fact that prior to this Court's interpretation of Artuz the Eleventh Circuit interpreted § 2244(d)(2) differently is not a change in the law. That is, the Court's interpretation of 28 U.S.C. § 2244(d)(2) did not overrule any prior decision of the Court, but instead resolved a conflict between the circuit courts of appeal as to the proper interpretation of the statutory provision. When "[the] Court construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law." Rivers, 511 U.S. 298, 313 n.12 (1994). At most, then, the Eleventh Circuit incorrectly interpreted the meaning of a "properly filed" state postconviction relief motion. Accordingly, petitioner's argument distinguishing the applicability of Teague v. Lane, 489 U.S. 288 (1989), Pet.Br. at 44-45 n.23, presents a nonissue. Instead, Teague and this Court's retroactivity jurisprudence demonstrate that petitioner seeks greater retroactivity rights in connection with procedural rules pertaining to the habeas proceeding itself, as compared to retroactivity with new rules of constitutional law relative to the underlying conviction and/or sentence. Petitioner would have the Court elevate habeas corpus to

the "main event." For the Court to adopt that position is to turn a deaf ear to the principle that the actual existence of a statute "'is an operative fact and may have consequences that cannot justly be ignored. . . .'" Id. at 308 (internal citation omitted). Petitioner cites no support in furtherance of a contrary result.

Since its enactment, this Court has had occasion to interpret AEDPA's provisions. See, e.g., Rhines v. Weber, ___ S.Ct. ___, 2005 U.S. LEXIS 2930 (No. 03-9046) (Mar. 30, 2005) (whether a district court may issue a stay and hold a case in abeyance pending exhaustion of state court remedies); Williams v. Taylor, 529 U.S. 362, 405 (2000) (§ 2254(d)); Artuz v. Bennett, 531 U.S. 4 (2000) (§ 2244(d)(2) - whether a state postconviction application containing procedurally barred claims is "properly filed"); Duncan v. Walker, 533 U.S. 167 (2001) (§ 2244(d)(2) - whether a federal habeas petition tolls the limitation period); Carey v. Saffold, 536 U.S. 214 (2002) (§ 2244(d)(2) - whether a state collateral proceeding is "pending" between the time the lower court issues its decision and an appeal is filed). The Court also currently has cases pending requiring interpretation of AEDPA. See Pace v. DiGuglielmo, No. 03-9627 (whether an untimely state collateral application is "properly filed" as contemplated under subsection (d)(2); argued Feb. 28, 2005); Dodd v. United States, No. 04-5286 (whether the one-year limitation period under § 2255 ¶6(3), identical to that in § 2244(d)(1)(C), begins when a new rule of constitutional law is made retroactive or when the Court simply recognizes a new right; argued Mar. 22, 2005). Other questions concerning the construction of particular AEDPA provisions may eventually require this Court's attention, although the Court, has, to date, denied certiorari. For example, the Court has declined to determine whether § 2244(d)(2) applies to the period from which certiorari could have been and/or was sought following the affirmance of denial of state postconviction or collateral relief. See infra, at 44-45 n.34 ¶2.

Each of these decisions interpreting federal habeas law provides fertile ground for reopening the denial of habeas relief if

Rule 60(b) is a viable alternative to the absolute bar under § 2244(b)(1). For example, in petitioner's case, were the Court to decide in Pace v. DiGuglielmo, No. 03-9627 (argued Feb. 28, 2005), that an untimely state collateral application is "properly filed" as contemplated under § 2244(d)(2), petitioner would of course seek Rule 60(b) relief again, albeit twenty-three years after he pled guilty.[34]

---

[34] Other examples abound. Additional cases where a Rule 60(b) motion would likely be filed if the Court were to conclude that the time is tolled upon the filing of an untimely state petition would include: Williams v. Sims, 390 F.3d 958 (7th Cir. 2004); Wade v. Battle, 379 F.3d 1254 (11th Cir. 2004); Merritt v. Blaine, 326 F.3d 157 (3rd Cir.), cert. denied, 540 U.S. 921 (2003); Siebert v. Campbell, 334 F.3d 1018 (11th Cir. 2003); Stafford v. Thompson, 328 F.3d 1302 (11th Cir. 2003); Johnson v. Wolfe, 41 Fed. Appx. 733 (6th Cir. Jun. 21, 2002) (unpublished); Brooks v. Walls, 301 F.3d 839 (7th Cir. 2002), cert. denied, 538 U.S. 1001 (2003); Wright v. Norris, 299 F.3d 926 (8th Cir. 2002); Allen v. Mitchell, 276 F.3d 183 (4th Cir. 2001); Israfil v. Russell, 276 F.3d 768 (6th Cir. 2001), cert. denied, 535 U.S. 1088 (2002); Williams v. Cain, 217 F.3d 303 (5th Cir. 2000); Morgan v. Money, 2000 U.S. App. LEXIS 1914 (6th Cir. Feb. 8, 2000) (unpublished); Hernandez v. Peirson, 2000 U.S. App. LEXIS 30179 (7th Cir. Nov. 27, 2000) (unpublished), cert. denied, 532 U.S. 1068 (2001); Freeman v. Page, 208 F.3d 572 (7th Cir.), cert. denied, 531 U.S. 946 (2000); Romaine v. Woods, 2000 U.S. App. LEXIS 18606 (9th Cir. Jul. 26, 2000) (unpublished); Webster v. Moore, 199 F.3d 1256 (11th Cir.), cert denied, 531 U.S. 991 (2000); Palmer v. Corcoran, 1999 U.S. App. LEXIS 23336 (4th Cir. Sept. 24, 1999) (unpublished); Kiel v. Scott, 1999 U.S. App. LEXIS 2500 (10th Cir. Feb. 18, 1999) (unpublished), cert. denied, 528 U.S. 1115 (2000); Conner v. Lemaster, 1999 U.S. App. LEXIS 2495 (10th Cir. Feb. 18, 1999) (unpublished). The foregoing list is without consideration of those district court § 2244(d)(2) dismissals in which a certificate of appealability was not sought and/or obtained.

One would also expect to see Rule 60(b) motions in every circuit but the Sixth Circuit, see Abela v. Martin, 348 F.3d 164, 169-173 (6th Cir. 2003) (en banc) (the only circuit holding that the time to seek certiorari following denial of state collateral proceeding is tolled irrespective of whether or not a writ is filed), cert. denied, 124 S.Ct. 2388 (2004), if the Court were to accept for review and interpret § 2244(d)(2) to include the time in which a petition for writ of certiorari could have been and/or was sought following the denial of state postconviction relief. See, e.g., Smaldone v. Senkowski, 273 F.3d 133, 136-138 (2nd Cir. 2001), cert. denied, 535 F.3d 1017 (2002); Miller v. Dragovich, 311 F.3d 574, 578-580 (3rd Cir. 2002), cert. denied, 540 U.S. 859 (2003); Crawley v. Catoe, 257 F.3d 395, 398-401 (4th Cir. 2001), cert. denied, 534 U.S. 1080 (2002); Ott v. Johnson,

The point is not whether habeas petitioners will ultimately be successful in reopening the § 2254 proceedings as argued by petitioner, Pet.Br. at 45-46, but the very existence of an avenue inconsistent with AEDPA that reinstates the very delay Congress intended to foreclose. The filing of Rule 60(b) motions require the government to respond, petitioners then file a reply, district courts must review and rule upon the motions, only to be followed by attempts to appeal from denied motions. To assert that the availability of the general civil rule will have minimal effect on habeas proceedings ignores the reality of present conditions. Indeed, the lower federal courts in each of the circuits are routinely required to determine if a Rule 60(b) is in actuality a successive petition.[35] This situation violates AEDPA by permitting frivolous

---

192 F.3d 510, 512-513 (5th Cir. 1999), cert. denied, 529 U.S. 1099 (2000); Gutierrez v. Schomig, 233 F.3d 490, 491-492 (7th Cir. 2000), cert. denied, 532 U.S. 950 (2001); Snow v. Ault, 238 F.3d 1033, 1035 (8th Cir.), cert. denied, 532 U.S. 998 (2001); Dukes v. Garcia, 53 Fed. Appx. 458, 459 (9th Cir. Dec. 13, 2002) (unpublished); Rhine v. Boone, 182 F.3d 1153, 1155-1156 (10th Cir. 1999), cert. denied, 528 U.S. 1084 (2000); Coates v. Byrd, 211 F.3d 1225, 1226-1227 (11th Cir. 2000), cert. denied, 531 U.S. 1166 (2001).

Similarly, the same may be said now that this Court has held that a district court does not abuse its discretion in granting a stay and holding the federal habeas proceedings in abeyance in order for a petitioner to return to state court for exhaustion purposes, to the extent that a petition previously had been dismissed and then held untimely upon refiling. See Rhines, 2005 U.S. LEXIS 2930 *16-18. Likewise if the Court were to hold that the one-year limitation period under § 2255 ¶6(3) begins when a new rule of constitutional law is actually held retroactive, rather than just announced. See Dodd v. United States, No. 04-5286 (argued Mar. 22, 2005).

[35] A query search on the LexisNexis legal website with the terms "successive" and "60(b)" within the same paragraph returned over 500 reported cases. The frequency in which Rule 60(b) motions are filed in habeas proceedings presently is without this Court's imprimatur. The reported cases reaching the circuit courts of appeal, over 300, typically concern whether the lower court erred in treating the Rule 60(b) motion as a successive petition; those courts must then first determine whether appellate jurisdiction is vested.

pleadings,[36] and defeats the states' substantial interest in finality of criminal judgments.[37] "It goes without saying that, at some point, judicial proceedings must draw to a close and the matter deemed conclusively resolved; no society can afford forever to question the correctness of its every judgment." Withrow, 507 U.S. at 698-699 (O'Connor, J., dissenting).

---

[36] Even petitioner recognizes that very few such motions have culminated in relief. Pet.Br. at 45-46. That net result, however, obviously has not precluded or otherwise discouraged habeas petitioners from seeking reconsideration of the denial of habeas relief. See supra, at 45 n.35.

[37] In 1995, the average time for processing of a state prisoner's habeas petition was 280.9 days. U.S. Dept. of Justice, Federal Justice Statistics Program, Bureau of Justice Statistics, J. Scalia, Prisoner Petitions in the Federal Courts, 1980-96, at 7-8 (Oct. 1997, NCJ-164615), available online at http://www.ojp.usdoj.gov/bjs/pub/pdf/ppfc96.pdf. And based upon the increased number of habeas filings in recent years, see U.S. Dept. of Justice, Bureau of Justice Statistics, J. Scalia, Special Report - Prisoner Petitions Filed In U.S. District Courts, 2000, with Trends 1980-2000, at 1 (Jan. 2002, NCJ-189430) (increase of 13 to 17 per 1,000 inmates of state prisoner habeas petition filings between 1995 and 2000), available online at http://www.ojp.usdoj.gov/bjs/pub/pdf/ppfusd00.pdf, in conjunction with the continued shortage of federal judges, the likelihood that the situation has improved is nil.

CONCLUSION

The judgment of the United States Court of Appeals for the Eleventh Circuit should be affirmed.

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

CAROLYN M. SNURKOWSKI
Assistant Deputy Attorney General

CHRISTOPHER M. KISE
Solicitor General

CASSANDRA K. DOLGIN*
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
The Capitol
Tallahassee, FL 32399-1050
(850) 414-3300

**Counsel of Record*

(14)

Supreme Court, U.S.
FILED
APR 18 2005
OFFICE OF THE CLERK

No. 04-6432

IN THE

Supreme Court of the United States

AURELIO O. GONZALEZ,
Petitioner,

v.

JAMES V. CROSBY, JR.
Secretary for the Department of Corrections,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF OF PETITIONER

KATHLEEN M. WILLIAMS
Federal Public Defender
PAUL M. RASHKIND *
Assistant Federal Public Defender
Chief of Appeals
RICHARD C. KLUGH
Assistant Federal Public Defender
Deputy Chief of Appeals
OFFICE OF THE FEDERAL
PUBLIC DEFENDER
Southern District of Florida
150 West Flagler Street, Suite 1500
Miami, Florida 33130-1555
(305) 536-6900

* Counsel of Record

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	iii
REPLY ARGUMENT	1
I. Respondent Ignores Cardinal Rules of Statutory Construction, Overlooks the Court's Traditional Analytical Formulation in Construing AEDPA, and Responds Instead to a Distortion of Mr. Gonzalez's Arguments	2
II. Respondent and His Amici Overstate the Just Role of Finality in Habeas Corpus Litigation Generally and in the Present Case, in Particular	7
III. Neither *Calderon v. Thompson* nor *Plaut v. Spendthrift Farm* Justifies the Eleventh Circuit's Categorical Prohibition of Rule 60(b) Motions in Habeas Corpus Cases	9
IV. Mr. Gonzalez Did Not Default His Claims in State or Federal Court	11
V. Amicus Curiae United States' Concession that the Eleventh Circuit's Categorical Holding is Overbroad is Correct, But Its Conclusions About the Viability of Rule 60(b)(6) in the Present Case are Not	13
VI. Amici Curiae States' Apparent Call for a Rule More Strict than the Eleventh Circuit's Categorical Holding Conflicts With the Court's Decision in *Calderon v. Thompson*, is Inapposite to the Question Presented, and is Better Addressed by Rigorous Application of the Stay Provisions of 28 U.S.C. §§ 2251 and 2262(b)&(c)	16

TABLE OF CONTENTS—Continued

Page

VII. Respondent and His Amici Envision a Statutory Scheme that is Incompatible with the Just Aims of Finality and the Legitimate Goals of AEDPA 17

CONCLUSION 20

TABLE OF CITED AUTHORITIES

CASES: Page

Arbelaez v. State, ___ So.2d ___, 2005 WL 168570 (Fla. Jan. 27, 2005) 19
Artuz v. Bennett, 531 U.S. 4 (2000) 6, 12
Atkins v. Virginia, 536 U.S. 304 (2002) 18, 19
Bowers v. Hardwick, 478 U.S. 186 (1986) 18
Browder v. Director, 434 U.S. 257 (1978) 8
Buradus v. General Cement Prods. Co., 356 Pa. 349, 52 A.2d 205 (1947) 6
Calderon v. Thompson, 523 U.S. 538 (1998) .....9, 11, 16.
Dretke v. Haley, 541 U.S. 386, 124 S. Ct. 1847 (2004) 19
Exxon Mobil Corp. v. Saudi Basic Ind. Corp., 544 U.S. ___, 125 S. Ct. 1517 (2005) 20
Felker v. Turpin, 518 U.S. 651 (1996) 4, 5, 20
Fiore v. White, 528 U.S. 23 (1999) 6
Gonzalez v. Sec'y for Dep't of Corr., 366 F.3d 1253 (11th Cir. 2004) (*en banc*) 1, 16
Harris v. Nelson, 394 U.S. 286 (1969) 8
Harris v. United States, 536 U.S. 545 (2002) 6
Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944) 11
In re Hicks, 375 F.3d 1237 (11th Cir. 2004) 17
In re Holladay, 331 F.3d 1169 (11th Cir. 2003) 17, 18, 19
Lawrence v. Texas, 539 U.S. 538 (2003) 18
Lonchar v. Thomas, 517 U.S. 314 (1996) 5
Martinez-Villareal v. Stewart, 523 U.S. 637 (1998) 4, 6, 11
Miller v. French, 530 U.S. 327 (2000) 10
Murray v. Carrier, 477 U.S. 478 (1986) 13
O'Sullivan v. Boerckel, 526 U.S. 838 (1999) 12
Penry v. Lynaugh, 492 U.S. 302 (1989) 18
Pitchess v. Davis, 421 U.S. 482 (1975) 8
Plaut v. Spendthrift Farm, 514 U.S. 211 (1995) ..9, 10, 11

TABLE OF CITED AUTHORITIES—Continued

	Page
Rhines v. Weber, 544 U.S. ___, 125 S. Ct. 1528 (2005)	7, 8, 9, 16
Roper v. Simmons, 543 U.S. ___, 125 S. Ct. 1183 (2005)	18
Rose v. Lundy, 455 U.S. 509 (1982)	7
Rust v. Sullivan, 500 U.S. 173 (1991)	6
Slack v. McDaniel, 529 U.S. 473 (2000)	4, 6, 7, 11
Stanford v. Kentucky, 492 U.S. 361 (1989)	18
Teague v. Lane, 489 U.S. 288 (1989)	3, 8, 19
Thomas v. Crosby, 371 F.3d 782 (11th Cir. 2004)	13
CONSTITUTIONAL PROVISIONS:	
U.S. Const. art. I, sec. 9	4, 5
U.S. Const. amend V	4
STATUTES:	
28 U.S.C. § 2244(b)(1)	1, 3, 4, 5, 19
28 U.S.C. § 2244(b)(2)	3, 19
28 U.S.C. § 2244(d)	11
28 U.S.C. § 2244(d)(1)(C)	19
28 U.S.C. § 2244(d)(2)	6
28 U.S.C. § 2251	16, 17
28 U.S.C. § 2254	7
28 U.S.C. § 2262(b)	16, 17
28 U.S.C. § 2262(c)	16, 17
Antiterrorism and Effective Death Penalty Act of 1996 Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996)	*passim*
RULES:	
Fed. R. Civ. P. 40	9
Fed. R. Civ. P. 41(b)	10
Fed. R. Civ. P. 60(b)	*passim*
Fed. R. Civ. P. 60(b)(6)	*passim*
Fla. R. Crim. P. 3.850(b)(1)	11

REPLY ARGUMENT

The question on which the Court granted certiorari pits the Eleventh Circuit's categorical prohibition of Rule 60(b) in habeas corpus cases against the functional approach adopted by nearly every other circuit. Respondent's brief does not directly defend the categorical bar and instead restates the issue to suggest that the Eleventh Circuit's decision was more fact-based than categorical.[1] Amicus Curiae United States expressly disavows the Eleventh Circuit's holding that all Rule 60(b) motions (except those for fraud) are prohibited, conceding that the Eleventh Circuit's "categorical prohibition on all other grounds for relief under Rule 60(b) *goes too far*," U.S. Br. 24 (emphasis added), and acknowledging that "fraud is not the only type of non-clerical error that falls outside AEDPA's reach." *Id.* at 25-26 (offering examples of the overbreadth of the Eleventh Circuit's categorical rule). *Amicus Curiae* Criminal Justice Legal Foundation ("CJLF") makes a similar concession, identifying specific instances in which Rule 60(b) motions are proper, including the case of an intervening change in law. CJLF Br. 19, 23-24.

Amici Curiae States of Tennessee, et al. ("States") address the question as presented, but confine their argument to a situation not present here, potential abuse of Rule 60(b) by death row litigants. As we discuss, *infra* at 16-17, the States get less relief from the Eleventh Circuit's decision than from a functional application of Rule 60(b).

---

[1] Respondent's "restated" issue, "Whether a Rule 60(b) motion seeking to relitigate the final disposition of a federal habeas petition constitutes a prohibited 'second or successive' petition under 28 U.S.C. § 2244(b)(1)," Resp. Br. i, misses the thrust of the question presented, the correctness of the categorical bar imposed below. *Gonzalez v. Sec'y for Dep't of Corr.*, 366 F.3d 1253, 1261, 1285-86, 1287 (11th Cir. 2004) (en banc) (affirming district court order that it *lacked jurisdiction* over Rule 60(b) motion); JA 21, 78.

I. Respondent Ignores Cardinal Rules of Statutory Construction, Overlooks the Court's Traditional Analytical Formulation in Construing AEDPA, and Responds Instead to a Distortion of Mr. Gonzalez's Arguments.

Respondent avoids application of the Court's traditional and accepted analytical framework for interpreting AEDPA and the cardinal rules of statutory construction that have guided that process. *See* Pet. Br. 14-39. Instead, Respondent engages in *argumentum ad absurdum*, straining to create strawman readings of both Rule 60(b)(6) and Mr. Gonzalez's argument: "Gonzalez asks this Court to hold that Rule 60(b)(6) . . . may be used to reopen closed habeas cases, solely on the basis of subsequent changes in decisional law occurring years after habeas relief was denied." Resp. Br. 9.[2] Mr. Gonzalez makes no such broad or simplistic claim. His answer to the question presented is manifold: (a) Rule 60(b) motions in habeas corpus cases are not categorically prohibited in all instances, but rather they must be sorted individually based on the functional approach applied by the

[2] In an effort to make it appear that Rule 60(b) traffic will be unmanageable, respondent notes that a cursory LEXIS search of the term "successive" within a paragraph of the term "60(b)" produces a list of 300 circuit court decisions. Resp. Br. 45 n. 35; *cf.* Abdur'Rahman Br. 5 (noting that 330 Rule 60(b) motions have been filed since the effective date of AEDPA). Review of those cases reveals that about 200 involve the interplay between AEDPA's successive petition bar and Rule 60(b). That is an average of fewer than two cases per circuit per year for each of the nine years that AEDPA has been in effect. Moreover, many of the LEXIS citations are one-time threshold determinations of the continuing viability of Rule 60(b), a question that will not recur after the decision here. Even if one includes all 330 cases, on average each federal circuit has addressed just three such cases per year. Most opinions were brief and officially unpublished, and none indicated that the issue contributed significantly to the workload of any court. Respondent's statistics, like those of *Amicus Curiae* Abdur'Rahman, confirm that Rule 60(b) coexists comfortably with AEDPA.

vast majority of circuits; (b) Rule 60(b)(6) may permit relief from a final judgment in the case of an intervening change in law, *if coupled with exceptional circumstances*; (c) A district court has discretion to reopen a habeas judgment dismissing claims of facial merit as a result of a mistakenly applied procedural bar—*e.g.*, statute of limitations or exhaustion—based on an intervening decision that establishes that the dismissal was a mistake of existing law, if coupled with exceptional circumstances; (d) Rule 60(b)(6) relief may be available to reopen a final habeas corpus judgment incorrectly decided on the merits of a claim, based on a supervening Supreme Court decision that is retroactively applicable under *Teague v. Lane*, 489 U.S. 288 (1989); and (e) Rule 60(b), with its "reasonableness" temporal limit, is not inconsistent with the congressional intent expressed in AEDPA, which, in exceptional circumstances, imposes no temporal limits on opening or reopening habeas litigation. *See* AEDPA §§ 101 and 106, codified at 28 U.S.C. § 2244(b)(2) and (d)(1)(C).

Respondent seeks to avoid addressing the Due Process and Suspension of the Writ concerns raised by the Eleventh Circuit's decision by repeating the erroneous incantation that those considerations are not properly before the Court. Resp. Br. 31 n. 25. Both the Due Process and Suspension of the Writ contentions made here by Mr. Gonzalez were advanced by him below[3] and in support of Question

[3] Respondent takes out of context a footnote in one of petitioner's *en banc* briefs below that distinguishes the Due Process claim from a Suspension of the Writ claim, but respondent notably fails to advise this Court that in later court of appeals briefing petitioner detailed a separate Suspension of the Writ argument. *En banc* briefing came in two stages. In the second stage, the court of appeals directed the parties to answer two more questions in a supplemental letter brief, including whether AEDPA could "inform" whether Rule 60(b) relief remains available post-AEDPA. JA-11 (6/27/2003). Petitioner filed his Supplemental Brief, beginning with the preface, "As explained more fully below, the answers to both questions are constrained by at least two constitutional limitations . . ."

One of the petition for writ of certiorari, on which the Court granted review.[4]

---

followed by a summary of the argument: "(a) The Due Process Clause of the Fifth Amendment prohibits any interpretation of Rule 60(b)(6) that deprives Mr. Gonzalez of his entitlement to a timely filed first federal habeas corpus proceeding; (b) Applying 28 U.S.C. § 2244(b)(1) to inform the interpretation of Rule 60(b)(6) in a way that prohibits Rule 60(b)(6) motions as successive habeas petitions, is unconstitutional under the Suspension of the Writ Clause of U.S. Const. art. I sec. 9; . . ." JA-11 (7/11/2003) at 1, 3. Petitioner then argued the Due Process claim, *id.* at 4-8, and made a Suspension of the Writ argument. *Id.* at 8-10. He incorporated the same arguments in response to the court of appeals' second question, *id.* at 13, and summarized the constitutional argument in the concluding paragraph of his supplemental brief. *Id.* at 15.

[4] The substance of Question One, on which this Court granted certiorari, includes both the Suspension of the Writ and Due Process issues. Pet. 19-22, 29. Although the same principles were also advanced in support of Question Two, on which certiorari was not granted, the argument in support of Question One certainly included both the Due Process and Suspension of the Writ contentions. For example, the introduction to Issue I(B)(1) reads: "[T]he court of appeals' holding is inconsistent with the analytical framework used by this Court in post-judgment review of habeas corpus cases denied or dismissed on procedural grounds . . . and violates both the Due Process Clause of the Fifth Amendment and the Suspension of the Writ Clause of U.S. Const. art. I sec. 9." Pet. 17. This is followed by a sub-point heading to Issue One: "(1) Applying 28 U.S.C. § 2244(b)(1)'s Successive Application Bar as a Bright Line Prohibition of Rule 60(b)(6) Jurisdiction Is Contrary to the Court's Precedents, Which Carefully Avoid Conflict with the Fifth Amendment's Due Process Clause and the Suspension of the Writ Clause of U.S. Const. art. I sec. 9." Pet. 17. The argument in support of that sub-point begins: "When a literal reading of AEDPA would collide with the Constitution, the Court has read the language differently, or seized upon Congressional silence or AEDPA's incorporated habeas corpus jurisprudence, to avoid the collision. Three illustrations of this analytical approach are *Slack v. McDaniel* [ ], *Felker v. Turpin* [ ], and *Martinez*-Villareal v. Stewart [ ]." Pet. 17-18 (citations omitted). The conclusion to the argument on Question One includes this summary: "The Eleventh Circuit's formulation of a bright line rule violates both the Due Process Clause of the Fifth

To the extent respondent does address the grave constitutional doubt arising from the interplay of AEDPA and the Due Process and Suspension clauses, he does so in a footnote, claiming the Suspension Clause issue is "foreclosed by *Felker [v. Turpin]*, 518 U.S. [651] at 658, 664 [(1996)]." Resp. Br. 31 n. 25. Only an overly-parsed reading of *Felker* could lead to such a conclusion, since *Felker*'s trajectory was specifically redirected to avoid Suspension Clause concerns. To "obviate any claim by petitioner under the . . . Suspension Clause," the Court held that neither AEDPA nor congressional silence repealed the Court's authority to entertain original habeas corpus proceedings. *Felker*, 518 U.S. at 660-61. Rather than foreclosing the Suspension Clause issue raised by Mr. Gonzalez, *Felker* provides a strong example of the Court's careful approach to analyzing the meaning of AEDPA, guiding decisions away from grave and doubtful constitutional interpretations. The other decision cited in respondent's argument, *Lonchar v. Thomas*, 517 U.S. 314 (1996) (rejecting district court's *ad hoc* equitable laches rule barring first habeas petition), also demonstrates how the Court's decisional compass has been altered to avoid collision with the Suspension Clause. *Id.* at 1299.[5]

Amendment and, in a separate context, the Suspension of the Writ Clause of U.S. Const. art. I sec. 9 . . . ." Pet. 26.

[5] Amicus Curiae CJLF has its own unique approach, arguing that the Suspension of the Writ Clause is "[l]ike the monster in a series of bad horror movies[;] this argument keeps coming back no matter how many times it appears to have been killed." CJLF Br. 27. We do not share CJLF's cinematic view of the Suspension Clause, and we reject their contention that "[i]t is high time for this Court to bury it for good." *Id.* Our own view is reinforced by the argument CJLF makes in the preceding paragraph, in which it concedes, "The successive petition rule enacted by Congress [in AEDPA, 28 U.S.C. § 2244(b)(1)] is considerably more stringent than this Court's pre-AEDPA cases." CJLF Br. 27. This is precisely the point made in Mr. Gonzalez's initial merits brief: Because the absoluteness of AEDPA's successive petition bar goes far beyond the

Respondent contends that the Suspension and Due Process clauses are not violated if an improper dismissal is based upon the law as it then existed. That is not the case here, since the controlling law at the time of the district court's incorrect dismissal was the same as it is today and the same as it has been since AEDPA was adopted: § 2244(d)(2) tolls the statute of limitations while a petitioner's state petition is pending. The law did not change; the Court's intervening decision in *Artuz v. Bennett*, 531 U.S. 4 (2000), simply corrected the lower courts' mistaken interpretation of existing law. *See Fiore v. White*, 528 U.S. 23 (1999) (quoting *Buradus v. General Cement Prods. Co.*, 356 Pa. 349, 52 A.2d 205, 208 (1947) ("[i]n general, the construction placed upon a statute by the courts becomes a part of the act, *from the very beginning*")) (emphasis in original). And, as Mr. Gonzalez has argued, dismissing a facially meritorious first habeas petition in violation of existing law suspends the writ and denies the due process right to have statutory habeas corpus review. Pet. Br. 32-39.

---

compass of prior habeas jurisprudence, it goes beyond the outer boundary where lurks the Suspension Clause. Pet. Br. 34-36. The Suspension Clause boundary serves to redirect the Court's analytical trajectory away from grave questions of unconstitutionality to interpretations that avoid such difficulties because "the avoidance canon rests upon our 'respect for Congress, which we assume legislates in the light of constitutional limitations.'" *Harris v. United States*, 536 U.S. 545, 556 (2002) (quoting *Rust v. Sullivan*, 500 U.S. 173, 191 (1991)). *Felker v. Turpin*, *Martinez-Villareal v. Stewart*, 523 U.S. 637 (1998), and *Slack v. McDaniel*, 529 U.S. 473 (2000), present examples of this effect. In *Felker* the Court avoided a Suspension issue by asserting its own original habeas jurisdiction. In *Martinez-Villareal* and *Slack*, the Court avoided constitutional questions by holding that a re-asserted claim, though technically a renewal of an original claim, is not necessarily "second or successive" if the prior claim was not adjudicated on its merits. As all three cases prove, the Suspension Clause is alive, well, and continuing to impact the Court's decision-making.

II. Respondent and His Amici Overstate the Just Role of Finality in Habeas Corpus Litigation Generally and in the Present Case, in Particular.

The interest in finality of habeas litigation is not absolute, as respondent and his amici presume. The Court made that very point recently in *Rhines v. Weber*, 544 U.S. ___, 125 S. Ct. 1528 (2005), addressing the instance in which requirements of the habeas law and orders of the court "unreasonably impair the prisoner's right to relief," *id.* at 1535 (quoting *Rose v. Lundy*, 455 U.S. 509, 522 (1982)), on "claims that are potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory tactics." *Rhines*, 125 S. Ct. at 1535. "In such a case," the Court found, "the petitioner's interest in obtaining federal review of his claims outweighs the competing interests in finality and speedy resolution of federal petitions." *Id.*

Rhines is instructive here, where the interplay of AEDPA and mistaken court rulings deprived Mr. Gonzalez of the right to have his exhausted, timely-filed, and facially meritorious claim heard and decided. *See* 28 U.S.C. § 2254 ("a district court *shall* entertain an application for writ of habeas corpus" that is timely, has exhausted claims, and upon which state remedies are unavailable or ineffective). Likewise, he was erroneously deprived of an appeal of that erroneous judgment due to the erroneous withholding of a certificate of appealability as to the district court's misinterpretation of AEDPA's statute of limitations, *Slack v. McDaniel*, 529 U.S. at 478 (AEDPA allows for issuance of COA for procedural dispositions not based on constitutional issue), in a *pre-Slack* order that erroneously required an appellate issue of constitutional dimension. JA-16 ¶ 31. Then, when he timely petitioned the court of appeals for rehearing of the COA denial, the clerk of court *returned his petition unfiled*, due to confusion over appellate case numbers, and advised him, erroneously, that the rehearing motion related to an appeal

that was dismissed and closed six months earlier. JA-16 ¶ 33. The repeated misinterpretation of AEDPA and erroneous court rulings "unreasonably impair[ed] the prisoner's right to relief" on timely-filed "claims that are potentially meritorious" and were presented without dilatory tactics by the petitioner. *Rhines*, 125 S. Ct. at 1525. Due to these breakdowns in the ordinary functioning of the courts, Mr. Gonzalez did not receive a full or fair determination of his claims, and the judgment in his case lacks the integrity to have finality.

This is not to say that Rule 60(b) is without encumbrances in habeas corpus cases. As Mr. Gonzalez readily acknowledges, habeas law can constrain a court's discretion to grant a Rule 60(b) motion. *See, e.g.*, Pet. Br. 44 n. 23, 47 (*Teague* limitations apply). But that is far different from saying that habeas law categorically prohibits entertaining such a motion at all. Decisions cited by respondent and his amici, *Pitchess v. Davis*, 421 U.S. 482 (1975) (discretion to grant Rule 60(b) subject to exhaustion requirements), *Browder v. Director*, 434 U.S. 257 (1978) (Fed. R. Civ. P. 81(a)(2) does not preclude application of Rules 52 and 59 in habeas cases; implying same for Rule 60(b)), and *Harris v. Nelson*, 394 U.S. 286, 298-300 (1969) (civil discovery rule granting litigant right to propound interrogatories does not apply in habeas cases, although habeas judge may exercise discretion to permit any type of appropriate discovery, including interrogatories), stand for the proposition already acknowledged: The *discretion* to grant a Rule 60(b) motion may be *constrained* by habeas law, but a district court is not *categorically barred* from granting appropriate relief. The Court highlighted this difference in *Rhines*, in which it considered the right of a district court to stay a habeas proceeding where AEDPA does not plainly prevent it, but the purposes of AEDPA are seemingly disserved by such a stay. "AEDPA does not deprive the district courts of that authority" the Court said, "but it does circumscribe their discretion." *Rhines*, 125 S. Ct.

at 1534. The same may be said for Rule 60(b): AEDPA does not deprive the district courts of that authority—it simply guides their discretion.

III. Neither *Calderon v. Thompson* nor *Plaut v. Spendthrift Farm* Justifies the Eleventh Circuit's Categorical Prohibition of Rule 60(b) Motions in Habeas Corpus Cases.

Respondent and his some of his amici rely on *Calderon v. Thompson*, 523 U.S. 538 (1998), to support the Eleventh Circuit's categorical rule. Mr. Gonzalez addressed that contention in his initial brief. Pet. Br. 23-25. Now, Amicus Curiae United States also contends that the Eleventh Circuit's reliance on *Calderon* is misplaced. U.S. Br. 26 n. 17. A number of important distinctions support this conclusion.

First, *Calderon* does not set forth a categorical prohibition of a congressionally-approved rule of procedure, as does the court of appeals' decision below, but, rather, holds that AEDPA policies may circumscribe an appellate court's discretion to exercise extraordinary judicial powers on its own initiative.[6] Second, the holding in *Calderon* was directed at delayed claim relitigation occurring long afer the habeas petitioner's claims had been actually decided on the merits, following evidentiary and other hearings, and after a full appellate review of those merits determinations all the way to this Court. To borrow respondent's metaphor, Mr. Thompson certainly had repeated bites at the habeas apple. The same cannot be said about Mr. Gonzalez's case, since his claims were never decided and he was erroneously denied an opportunity to appeal the federal district court's order of

[6] Thus, even respondent does not suggest that Mr. Gonzalez's petition for rehearing under Fed. R. App. P. 40, filed April 18, 2000, could be deemed a successive application for habeas relief simply because the court of appeals issued its mandate simultaneously with its April 6, 2000 denial of petitioner's COA motion.

dismissal because neither the district court nor the court of appeals would grant a COA permitting an appeal. Mr. Gonzalez never got to bite at the apple at all.

To avoid this significant distinction between cases, respondent and his amici rely on an inapposite definition of "on the merits" in *Plaut v. Spendthrift Farm*, 514 U.S. 211, 228 (1995), to make it appear that the summary dismissal of Mr. Gonzalez's habeas petition was a bite at the habeas apple. Resp. Br. 34; U.S. Br. 18. But *Plaut* does not apply here. *Plaut* was a civil securities fraud case in which an Act of Congress permitted a class of dismissed cases to be reopened. The Court struck down the Act "on separation of powers grounds" because it "required federal courts to reopen final judgments that had been entered before the statute's enactment." *Miller v. French*, 530 U.S. 327, 343 (2000). Discussing its conclusion, the *Plaut* Court noted that rules of finality treat a limitations-based dismissal of an *action for money damages* as a judgment on the merits, but "was careful to distinguish the situation before the Court in that case—legislation that attempted to reopen the dismissal of a suit seeking money damages"—from other judgments not involving money damages, particularly those with "prospective effect." *Miller v. French*, 530 U.S. at 344. *Plaut*'s characterization of a limitations-based dismissal of a judgment for money damages does not extend to the context of habeas corpus cases, and neither respondent nor his amici have identified a habeas corpus decision of the Court that applies *Plaut* in this way.

The Court has not applied the technical *Plaut*-type "merits" definition, *cf.* Fed. R. Civ. P. 41(b), to the habeas corpus setting. Rather, the Court has used a functional analysis to decide if a petitioner had a bite at the habeas apple. In cases construing AEDPA and pre-AEDPA habeas law, the Court has not counted a bite at the apple if the habeas petitioner's claims were not previously decided, regardless of the

technical way in which the disposition was framed and even where dismissals were correctly ordered, for otherwise "the implications for habeas practice would be far reaching and seemingly perverse." *Martinez-Villareal v. Stewart*, 523 U.S. at 644 (holding, for purposes of "second or successive" bar, procedurally dismissed claim does not count as determination on merits); *see, e.g., Slack v. McDaniel*, 529 U.S. at 488 (holding that original dismissal was procedural, not on the merits—and therefore new petition was not second or successive—because "'[n]o claim made in Slack's 1991 petition was adjudicated during the three months it was pending in federal court").

Calderon v. Thompson set forth a rule of discretion limiting repeated bites at the apple for a habeas petitioner who had a first bite plus many more, especially when the final bite (mandate vacatur) was not a process authorized by court rules or regularly allowed by jurisprudence. The *Calderon* rule of discretion does not apply to Mr. Gonzalez, who was erroneously denied any bite at the habeas apple, and has invoked a formal rule of court to correct that mistake, "Rule 60(b), which authorizes discretionary judicial revision of judgments . . . reflect[ing] and confirm[ing] the courts' own inherent and discretionary power," *Plaut*, 514 U.S. at 234-35, "firmly established in English practice long before the foundation of our Republic," *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944), "to set aside a judgment whose enforcement would work inequity." *Plaut*, 514 U.S. at 235.

IV. Mr. Gonzalez Did Not Default His Claims in State or Federal Court.

Respondent argues that Mr. Gonzalez cannot benefit from the tolling provisions of 28 U.S.C. § 2244(d), contending his collateral review petition was not properly before the Florida courts since it was filed outside Florida's general two-year limitations period. Resp. Br. 40 n. 33. Respondent overlooks both the law and the facts. Florida's general statute of

limitations for seeking postconviction relief has an exception for newly discovered evidence if the motion "alleges that . . . the facts on which the claim is predicated were unknown to the movant . . . and could not have been ascertained by due diligence . . . ." Fla. R. Crim. P. 3.850(b)(1). Mr. Gonzalez made such an allegation in both his state and federal petitions. JA-2 DE 5 (Appendix to State's Response) Ex. C at 2; JA-1 DE 1 at 5 ¶ 12.A. Florida courts treated his collateral relief motion as properly filed.[7] Respondent's continuing dispute on this issue merely repeats the warden's argument rejected by the Court in *Artuz v. Bennett*.

The United States alleges a never-before-announced procedural default, that Mr. Gonzalez's failure to pursue certiorari review to this Court from the denial of a COA "disqualif[ies] him" from Rule 60(b) relief. U.S. Br. 29. Unable to cite authority for this proposition, the government compares the obligations imposed by *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999), which requires a state prisoner to exhaust his claims by seeking discretionary review in the *state* supreme court. U.S. Br. 30. This innovative contention fails for three reasons. First, the Court has never required certiorari review as a precondition to consideration for relief under Rule 60(b). Second, the requirement of *O'Sullivan v. Boerckel* is a rule of federalism and comity, requiring exhaustion of all *state* review before a claim ripens for federal

[7] The state trial court addressed the motion on its merits, but "denied" it because "the allegations contained therein do not constitute legal grounds for granting the New Trial or release of the prisoner, and the motion being insufficient in substance to support the relief prayed." JA-2 DE 5 Ex. I (Order Dec. 26, 1996). That order was affirmed by the state court of appeal on April 9, 1997, rehearing denied on May 8, 1997. *Id.* The federal statute of limitations was tolled, therefore, from November 25, 1996 (when the state motion was filed) until it was finally denied by the state courts on May 8, 1997. Mr. Gonzalez filed his federal habeas petition in June, 1997. With statutory tolling, the petition was filed less than nine months into the one-year limitations period.

habeas corpus. Neither federalism nor comity apply to, or require a prisoner to seek, a writ of certiorari in the U.S. Supreme Court. *See Thomas v. Crosby*, 371 F.3d 782, 813 n. 15 (11th Cir. 2004) (Tjoflat, J., specially concurring) (requirement that state prisoner seek certiorari from the United States Supreme Court has been rejected). Third, on April 18, 2000, Mr. Gonzalez filed a timely petition for rehearing directed to the court of appeals' April 6, 2000 denial of a COA, but the clerk of the court of appeals *returned the motion unfiled* (apparently due to confusion over case numbers), explaining, erroneously, that his appeal was *dismissed and closed on October 28, 1999*. This official misinformation carried the weight of a court decision and was enough to convince a *pro se* litigant (and some lawyers) that the 90-day window for filing a certiorari petition expired, as well. It would be unfair to impose a new rule of default on Mr. Gonzalez for failing to seek further review of the denial of a COA, when his very efforts to accomplish that were erroneously returned unfiled with the caveat that further relief was out-of-time by over six months. *Cf. Murray v. Carrier*, 477 U.S. 478, 488 (1986) (cause and prejudice exception includes impediment by official's interference).

V. *Amicus Curiae* United States' Concession that the Eleventh Circuit's Categorical Holding is Overbroad is Correct, But Its Conclusions About the Viability of Rule 60(b)(6) in the Present Case are Not.

Amicus Curiae United States stakes out a position of its own, separate and apart from respondent, and explicitly at odds with the Eleventh Circuit's categorical decision below, conceding that "[t]he court of appeals' test, limiting Rule 60(b) to instances of fraud and clerical error is unduly narrow." U.S. Br. 24. Instead of the Eleventh Circuit's categorical approach, the government advances its own test. Their test defines as second or successive Rule 60(b) motions

that challenge a federal court judgment that the claims presented do not support habeas relief, U.S. Br. 24-25, but permits Rule 60(b) relief,

> if the motion seeks relief predicated on the basis of an exceptional defect in the federal court's adjudicatory processes—an error that reflects a breakdown in the ordinary functioning of the court system, such that the initial judgment denying relief cannot be trusted or the prisoner otherwise did not receive a full and fair consideration of whether his claims provide a basis for federal relief—then the Rule 60(b) motion does not trench upon either AEDPA's text or purposes, and can be resolved as an ordinary Rule 60(b) motion.

U.S. Br. 25.

The government perceives a difference between its own test and that advanced by others, but its test is actually consistent with Mr. Gonzalez's approach to the Rule, with one exception noted below. According to the government, a Rule 60(b) motion may properly attack "a fundamental irregularity in the procurement or integrity of the initial habeas judgment" but "not . . . simply attack the correctness of the court's ultimate ruling." U.S. Br. 26. That position comports with Mr. Gonzalez's test because the first clause necessarily includes certain of the cases in the second clause; that is, a district court's incorrect decision to not entertain or rule upon a properly filed first petition is a fundamental irregularity in the procurement or integrity of the initial habeas judgment. An intervening decision that corrects that refusal to rule on the claim is, therefore, properly cognizable if it otherwise satisfies the requirements of Rule 60(b)(6).

The government's test is inadequate, though, in that it does not allow a Rule 60(b) motion to reopen a claim decided on the merits, which is effectively overruled by a later decision that is made retroactively applicable. *See infra* at 17-19. The government test requires a caveat for the rare, but important,

occasions when such decisions occur: A Rule 60(b) motion is not second or successive if it raises an intervening decision of the Supreme Court, made retroactively applicable on collateral review.

The government quarrels with Mr. Gonzalez's Suspension of the Writ and Due Process analysis. "[I]f accepted, petitioner's argument would preclude the application of any statute of limitations to federal habeas corpus actions" and would effectively "proscribe this Court's longstanding default rules." U.S. Br. 22. The government contends, further, that neither the Suspension nor Due Process clauses insure against legal error in adjudicating a habeas corpus case. Both responses overstate Mr. Gonzalez's argument and overlook the Court's approach to these constitutional provisions: A habeas petitioner has a right to have heard his timely-filed, exhausted, and not-otherwise-barred claims made in a first petition. These clauses do not bar courts from the proper application of limitations or procedural default rules, but rather prevent a court from refusing to address a timely-filed first petition making a non-defaulted and exhausted habeas claim.

In the end, the government questions whether Mr. Gonzalez's case presents extraordinary circumstances. This is a question that should be answered in the first instance in the district court. Certainly this case presents a plethora of circumstances that are extraordinary from which a district court may choose, including the type, number and combination of legal errors, repeated at every stage of the habeas proceeding and appeal, *see supra* at 7-8, 11-13, which deprived Mr. Gonzalez of his right to both a first habeas petition on issues of facial merit and the appellate review that Congress intended.

VI. Amici Curiae States' Apparent Call for a Rule More Strict than the Eleventh Circuit's Categorical Holding Conflicts With the Court's Decision in *Calderon v. Thompson*, is Inapposite to the Question Presented, and is Better Addressed by Rigorous Application of the Stay Provisions of 28 U.S.C. §§ 2251 and 2262(b)&(c).

Amici Curiae States address a singular concern, the potential abuse of Rule 60(b) by death-sentenced inmates who have an interest in delaying judgment. They offer the experience of one state, Tennessee, as an example, using the pending cases of five death-sentenced defendants. That situation is not present here. Mr. Gonzalez is not a capital defendant. His interest is not to delay judgment, but rather to correct a mistaken judgment as quickly as possible. *See Rhines v. Weber*, 125 S. Ct. at 1535 ("generally, a [non-capital] prisoner's 'principal interest . . . is in obtaining speedy federal relief on his claims'").

The categorical decision below does not alleviate the States' concerns. Four of the five capital inmates about whom they complain filed Rule 60(b) motions based on fraud, and the Eleventh Circuit's decision categorically holds that Rule 60(b)(3) fraud claims remain viable and cognizable even under AEDPA. *Gonzalez v. Sec'y for Dep't of Corr.*, 366 F.3d at 1285-86; JA-64, 77. Any attempt to extend *Gonzalez*'s categorical bar to fraud allegations would conflict with *Calderon v. Thompson*, 523 U.S. at 557 (noting that fraud upon the court "call[s] into question the very legitimacy of the judgment").

The answer to the States' concern lies not in a categorical prohibition of Rule 60(b) relief—recharacterizing the motion to be something it is not, a second or successive petition—but rather in the proper implementation of the habeas corpus stay provisions by individual judges, in individual cases, based on a proper functional analysis both of the underlying motion

and the legal entitlement to a stay under 28 U.S.C. § 2251. For, "[i]f no stay is granted, any such [state court] proceeding shall be valid as if no habeas corpus proceedings or appeal were pending." *Id.*; *see, e.g., In re Holladay*, 331 F.3d 1169, 1177 (11th Cir. 2003) (holding that issuance of stay under § 2251 is not automatic, but rather based on four considerations, "likelihood of success on the merits and of irreparable injury if the stay is not granted, whether the stay would substantially harm other parties, and whether granting the stay would serve the public interest"). Absent a stay, a Rule 60(b) filing causes no delay at all. *See, e.g., In re Hicks*, 375 F.3d 1237 (11th Cir. 2004) (denying motion for 11th-hour stay of execution accompanying attempted successive petition); *see also* 28 U.S.C. § 2262(b) & (c) (providing for automatic expiration of stays of execution and limiting federal courts' power to issue a second stay of execution after the first expires).

VII. Respondent and His Amici Envision a Statutory Scheme that is Incompatible with the Just Aims of Finality and the Legitimate Goals of AEDPA.

The inadequacy of the positions taken by respondent and his amici is revealed by illustrating how their respective contentions work in the real world of habeas corpus.

Respondent and some of his amici accord absolute finality to a final judgment in habeas (absent fraud), even one that erroneously denies relief. Under no circumstances do they believe that Congress or the Constitution allow a district court to correct an erroneous judgment, even if the habeas petitioner was effectively denied habeas review of his claims and even if an intervening decision of the Supreme Court corrects the erroneous interpretation of law that gave rise to the final judgment. There is a categorical prohibition on Rule 60(b) motions to reopen a case, they argue, even one that was procedurally dismissed in violation of existing law, and even if that dismissal is contrary to congressional intent in AEDPA.

In addition, they would not permit a federal court avenue for a supervening and retroactively applied decision of the Supreme Court to be applied to diligent inmates, who advanced, but lost, the identical issue before the supervening decision was issued. Thus, for example, the diligent inmate who unsuccessfully challenged *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding state sodomy statute), would remain imprisoned despite the retroactively applicable *Lawrence v. Texas*, 539 U.S. 538 (2003) (holding unconstitutional state law prohibiting private act of consensual sodomy). The diligent death row inmates who perfected unsuccessful challenges to *Penry v. Lynaugh*, 492 U.S. 302 (1989) (upholding death penalty for mentally retarded killers), and *Stanford v. Kentucky*, 492 U.S. 361 (1989) (upholding death penalty for 16-17 year-old offenders), could still be executed despite the Court's intervening decisions in *Atkins v. Virginia*, 536 U.S. 304 (2002) (overruling *Penry* and prohibiting execution of mentally retarded offenders), and *Roper v. Simmons*, 543 U.S. __, 125 S. Ct. 1183 (2005) (overruling *Stanford* and prohibiting execution of 17-year-old juvenile offenders), even though those cases are to be applied retroactively. *Roper*, 125 S. Ct. at 1198 (holding that *Stanford* "should no longer control in those few pending cases or in those yet to arise"); *see In re Holladay*, 331 F.3d at 1172 (*Atkins* applies retroactively). Even a diligent inmate who advanced, unsuccessfully, a watershed change in the law would be denied the benefit of a later decision approving the watershed change; that is, if *Gideon v. Wainwright*, 372 U.S. 335 (1963), were decided today (rather than years ago), respondent and his amici have left no avenue for its application to diligent inmates who made the same claim in earlier habeas petitions that became final before the watershed decision.

Although the diligent inmate is denied the benefit of an intervening change of law, as respondent reads the successive application bar of 28 U.S.C. § 2244(b)(1), other less-diligent inmates who never filed a habeas petition, or who filed a

petition without raising the right later recognized, may obtain the full benefit of the intervening decision. *See* 28 U.S.C. §§ 2244(b)(2) (authorizing successive petition for new claims) and 2244(d)(1)(C) (authorizing out-of-time first petition for new claims).

There is no reason to believe Congress intended such disparate outcomes, for these results effectively negate the benefit of law for the class of inmates most deserving of the Court's *Teague* doctrine–a doctrine embraced in AEDPA's exceptions to *res judicata*–those who properly exhausted and perfected habeas claims on issues of constitutional dimension.

The United States understands this. It offers two alternatives for avoiding the conundrum. First, it joins the respondent's chorus: 'Trust us. The prosecuting sovereign will do the right thing, even if the federal courts have no power to do so. And there is always executive clemency, if the prosecutor or state courts fail to do the right thing.' If the sovereign's grace were truly enough, however, there would be no need for federal habeas corpus at all. The real world teaches just the opposite. The sovereign has a vested interest in defending its right to punishment and the sovereigns' vigorous advocacy in support of finality, in this case and others, is the rule, not the exception. *See, e.g., Dretke v. Haley*, 541 U.S. 386, 124 S. Ct. 1847, 1855-56 (2004) (KENNEDY, J., dissenting) (noting prosecution's opposition to petition for release, and failure of executive clemency, for individual sentenced for crime he did not commit); *In re Holladay*, 331 F.3d 1169 (state vigorously contested stay of execution at 11th-hour, despite meritorious *Atkins* claim); *Arbelaez v. State*, __ So.2d __, 2005 WL 168570 (Fla. Jan. 27, 2005) (state courts sustained prosecutor's opposition to applying *Atkins*).

The United States' second alternative to the conundrum caused by the Eleventh Circuit's categorical decision is that every adversely impacted inmate could simply file an original habeas corpus petition in the Supreme Court. It is true that

this Court retains jurisdiction over original habeas corpus petitions. *Felker v. Turpin*, 518 U.S. at 660-61. But this Court is not properly equipped to develop a record in the first instance for most habeas corpus cases—taking evidence, making credibility determinations, and the like—tasks for which the district courts are both well-equipped and specifically designated by Congress. *See Exxon Mobil Corp. v. Saudi Basic Ind. Corp.*, 544 U.S. ___, 125 S. Ct. 1517, 1526 n. 8 (2005) (noting that Congress has explicitly empowered district courts to oversee federal habeas review of state prisoner petitions). Moreover, the original writ process recommended by the United States would swell the Court's docket following every supervening decision, to address what is now currently disbursed to 680 district courtrooms throughout the Nation.

The functional approach advanced by Mr. Gonzalez, on the other hand, is a disciplined formulation that respects AEDPA while acknowledging necessary exceptions to absolute finality of habeas judgments.

CONCLUSION

Mr. Gonzalez, the United States, and the vast majority of circuits reject the incorrect and problematic categorical holding of the Eleventh Circuit. The judgment of the court of appeals should be reversed.

Respectfully submitted,

KATHLEEN M. WILLIAMS
Federal Public Defender
PAUL M. RASHKIND *
Assistant Federal Public Defender
Chief of Appeals
RICHARD C. KLUGH
Assistant Federal Public Defender
Deputy Chief of Appeals
OFFICE OF THE FEDERAL
PUBLIC DEFENDER
Southern District of Florida
150 West Flagler Street, Suite 1500
Miami, Florida 33130-1555
(305) 536-6900

* Counsel of Record

Counsel for Petitioner

Supreme Court, U.S.
FILED
APR 1 - 2005
OFFICE OF THE CLERK

No. 04-6432

In the Supreme Court of the United States

AURELIO O. GONZALEZ, PETITIONER

v.

JAMES V. CROSBY, JR., SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

CHRISTOPHER A. WRAY
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

PATRICIA A. MILLETT
Assistant to the Solicitor General

THOMAS M. GANNON
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether a motion for relief from judgment under Federal Rule of Civil Procedure 60(b) that seeks to reopen a federal court's final decision rejecting a habeas petitioner's challenge to a state criminal conviction constitutes a second or successive habeas corpus application, within the meaning of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	8
Argument:	
A motion under Federal Rule of Civil Procedure 60(b) is subject to AEDPA's limitations on second and successive applications for habeas corpus if the motion challenges the district court's holding that federal relief from the conviction is unavailable	11
A. AEDPA's restrictions on federal court review of second and successive applications sharply constrain Rule 60(b)'s operation in habeas corpus cases	11
B. Petitioner's Rule 60(b) motion is a prohibited successive habeas application because petitioner seeks to relitigate claims that the district court already held do not support federal relief under Section 2254	17
1. A dismissal on statute of limitations grounds is a judgment on the merits that triggers AEDPA's limitations	1
2. An alleged mistake of law does not preclude operation of Section 2244(b)'s limitations on second or successive habeas applications	22
3. The court of appeals' test, limiting Rule 60(b) to instances of fraud and clerical error, is unduly narrow	24
C. Petitioner is not entitled to relief under Rule 60(b)	28
Conclusion	30
Appendix	1a

TABLE OF AUTHORITIES

Cases: Page

Abdur'Rahman, In re, 392 F.3d 174 (6th Cir. 2004), petition for cert. pending, No. 04-1247 (filed Mar. 11, 2005) 21, 27
Ackerman v. *United States*, 340 U.S. 193 (1950) 16, 30
Agostini v. *Felton*, 521 U.S. 203 (1997) 28
Alley v. *Bell*, 392 F.3d 822 (6th Cir. 2004) 25
Altman v. *Benik*, 337 F.3d 764 (7th Cir. 2003) 21
AmBase Corp. v. *City Investing Co.*, 326 F.3d 63 (2d Cir.), cert. denied, 540 U.S. 1017 (2003) 19
Angel v. *Bullington*, 330 U.S. 183 (1947) 18, 29, 30
Artuz v. *Bennett*:
529 U.S. 1065 (2000) 5
531 U.S. 4 (2000) 4, 18, 29
Atkins v. *Virginia*, 536 U.S. 304 (2002) 27
Barrett v. *United States*, 965 F.2d 1184 (1st Cir. 1992) 14
Behringer v. *Johnson*, 75 F.3d 189 (5th Cir.), cert. denied, 516 U.S. 1182 (1996) 14
Bonin v. *Calderon*, 59 F.3d 815 (9th Cir. 1995), cert. denied, 516 U.S. 1051 (1996) 14
Brady v. *Maryland*, 373 U.S. 83 (1963) 25
Browder v. *Director, Dep't of Corrections*, 434 U.S. 257 (1978) 11
Brown v. *Payton*, No. 03-1039, 2005 WL 645182 (Mar. 22, 2005) 24
Calderon v. *Thompson*, 523 U.S. 538 (1998) ..... *passim*
Carey v. *Saffold*, 536 U.S. 214 (2002) 2-3
Carter v. *United States*, 150 F.3d 202 (2d Cir. 1998) 22
Coleman v. *Thompson*, 501 U.S. 722 (1991) 26
Cook, In re, 215 F.3d 606 (6th Cir. 2000) 22

Cases—Continued: Page

Cooter & Gell v. *Hartmarx Corp.*, 496 U.S. 384 (1990) 20
Engle v. *Isaac*, 456 U.S. 107 (1982) 13
Federated Dep't Stores, Inc. v. *Moitie*, 452 U.S. 394 (1981) 30
Felker v. *Turpin*, 518 U.S. 651 (1996) 2, 15, 19, 23, 27
Gonzalez v. *Secretary for the Dep't of Corrections*, 317 F.3d 1308 (11th Cir.), vacated for reh'g en banc, 326 F.3d 1175 (2003), on reh'g en banc, 366 F.3d 1253 (2004), cert. granted, 125 S. Ct. 961 (2005) 4, 6, 7
Gonzalez v. *State*, 692 So. 2d 900 (Fla. 3d Dist. Ct. App. 1997) 4
Graham v. *United States*, 72 F.3d 129 (6th Cir. 1995) 14
Guinan v. *Delo*, 5 F.3d 313 (8th Cir. 1993) 14
Hamilton v. *Newland*, 374 F.3d 822 (9th Cir. 2004), cert. denied, No. 04-7992, 2005 WL 517049 (Mar. 7, 2005) 27
Harris v. *United States*, 367 F.3d 74 (2d Cir. 2004) 27
Harvey v. *Horan*, 278 F.3d 370 (4th Cir. 2002) 22
Hazel-Atlas Glass Co. v. *Hartford-Empire Co.*, 322 U.S. 238 (1944) 25
Henderson v. *Lampert*, 396 F.3d 1049 (9th Cir. 2005) 21
Herrera v. *Collins*, 506 U.S. 390 (1993) 21
Hillary v. *TWA*, 123 F.3d 1041 (8th Cir. 1997), cert. denied, 522 U.S. 1090 (1998) 19
Hohn v. *United States*, 524 U.S. 236 (1998) 5
Hunt v. *Nuth*, 57 F.3d 1327 (4th Cir. 1995), cert. denied, 516 U.S. 1054 (1996) 14
Kuhlmann v. *Wilson*, 477 U.S. 436 (1986) 23
Landano v. *Rafferty*, 897 F.2d 661 (3d Cir.), cert. denied, 498 U.S. 811 (1990) 14

Cases—Continued: Page

Lazo v. *United States*, 314 F.3d 571 (11th Cir. 2002), vacated for reh'g en banc, 326 F.3d 1175 (2003), on reh'g en banc, 366 F.3d 1253 (2004) 1, 6
Lebron Ríos v. *United States Marshal Serv.*, 341 F.3d 7 (1st Cir. 2003) 20
Liljeberg v. *Health Serv. Acquisition Corp.*, 486 U.S. 847 (1988) 16, 28
Marshall v. *Holmes*, 141 U.S. 589 (1891) 25
McCleskey v. *Zant*, 499 U.S. 467 (1991) 12, 13, 23
Mitchell v. *Chapman*, 343 F.3d 811 (6th Cir. 2003), cert. denied, 124 S. Ct. 2908 (2004) 19
Mobley v. *Head*, 306 F.3d 1096 (11th Cir. 2002), vacated for reh'g en banc, 326 F.3d 1175 (2003), on reh'g en banc, 366 F.3d 1253 (2004), cert. denied, 125 S. Ct. 965 (2005) 6
Murphy v. *Klein Tools, Inc.*, 935 F.2d 1127 (10th Cir.), cert. denied, 502 U.S. 952 (1991) 19
Murphy v. *United States*, No. 99-5352, 2000 WL 274200 (D.C. Cir. Feb. 2, 2000), cert. denied, 530 U.S. 1248 (2000) 19
Murray v. *Carrier*, 477 U.S. 478 (1986) 13
Murray v. *Greiner*, 394 F.3d 78 (2d Cir. 2005) 21
North Georgia Elec. Membership Corp. v. *City of Calhoun*, 989 F.2d 429 (11th Cir. 1993) 19
Ortiz-Cameron v. *DEA*, 139 F.3d 4 (1st Cir. 1998) 19
O'Sullivan v. *Boerckel*, 526 U.S. 838 (1999) 30
Overbee v. *Van Waters & Rogers*, 765 F.2d 578 (6th Cir. 1985) 28
Pitchess v. *Davis* 421 U.S. 482 (1975) 11
Plaut v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) 11, 18
Pliler v. *Ford*, 124 S. Ct. 2441 (2004) 2
Reinke v. *Boden*, 45 F.3d 166 (7th Cir.), cert. denied, 516 U.S. 817 (1995) 19

Cases—Continued: Page

Rhines v. *Weber*, No. 03-9046 (Mar. 30, 2004), slip op. 2, 12, 15
Ritter v. *Smith*, 811 F.2d 1398 (11th Cir.), cert. denied, 483 U.S. 1010 (1987) 7, 28
Rodwell v. *Pepe*, 324 F.3d 66 (1st Cir.), cert. denied, 540 U.S. 873 (2003) 26
Sawyer v. *Smith*, 497 U.S. 227 (1990) 23
Scott v. *Singletary*, 38 F.3d 1547 (11th Cir. 1994), cert. denied, 515 U.S. 1145 (1995) 14
Shoup v. *Bell & Howell Co.*, 872 F.2d 1178 (4th Cir. 1989) 19
Slack v. *McDaniel*, 529 U.S. 473 (2000) 14, 20
Smith v. *Murray*, 477 U.S. 527 (1986) 12
Spencer, Ex parte, 228 U.S. 652 (1913) 22
Stewart v. *Martinez-Villareal*, 523 U.S. 637 (1998) 20
Stone v. *Powell*, 428 U.S. 465 (1976) 18
Tahoe-Sierra Preservation Council, Inc. v. *Tahoe Reg'l Planning Agency*, 322 F.3d 1064 (9th Cir. 2003) 19
Teague v. *Lane*, 489 U.S. 288 (1989) 13, 18, 23
Tyler v. *Cain*, 533 U.S. 656 (2001) 15, 23
United States v. *Barber*, 219 U.S. 72 (1911) 19
United States v. *Beggerly*, 524 U.S. 38 (1998) 25
United States v. *Clark*, 203 F.3d 358 (5th Cir. 2000), vacated on other grounds, 532 U.S. 1005 (2001) 21
United States v. *Land*, 213 F.3d 830 (5th Cir. 2000), cert. denied, 532 U.S. 904 (2001) 19
United States v. *Oppenheimer*, 242 U.S. 85 (1916) 19
United States v. *Oregon Lumber Co.*, 260 U.S. 290 (1922) 19
United States v. *Phillips*, 225 F.3d 1198 (11th Cir. 2000) 26

Cases—Continued: Page

United States v. *Sells Eng'g, Inc.*, 463 U.S. 418 (1983) 15
Wainwright v. *Sykes*, 433 U.S. 72 (1977) 22
Williams v. *Taylor*, 529 U.S. 362 (2000) 13, 24
Witkowski v. *Welch*, 173 F.3d 192 (3d Cir. 1999) 19
Woodford v. *Garceau*, 538 U.S. 202 (2003) 11

Constitution, statutes and rules:

U.S. Const.:
Art. I, § 9, Cl. 2 (Suspension Clause) 10, 22, 23, 24
Amend. IV 18
Amend. V (Due Process Clause) 9, 22, 23, 24
Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 1
§ 106, 110 Stat. 1217 2
28 U.S.C. 2244 ..... 2, 19, 21
28 U.S.C. 2244(a) 28
28 U.S.C. 2244(b) (1994) 20
28 U.S.C. 2244(b) 12, 20, 28
28 U.S.C. 2244(b)(1) 2, 9, 12, 19, 27
28 U.S.C. 2244(b)(2) 12, 20
28 U.S.C. 2244(b)(2)(A) 2, 10
28 U.S.C. 2244(b)(2)(B)(i) 2
28 U.S.C. 2244(b)(2)(B)(ii) 2
28 U.S.C. 2244(d) 2, 23
28 U.S.C. 2244(d)(1) 4
28 U.S.C. 2244(d)(1)(A) 3
28 U.S.C. 2244(d)(2) 3
28 U.S.C. 2253(c) 4
28 U.S.C. 2253(c)(3) 4
28 U.S.C. 2254 ..... *passim*
28 U.S.C. 2254(b) 23
28 U.S.C. 2254(b)(1)(A) 2
28 U.S.C. 2254(c) 2

Statutes and rules—Continued: Page

28 U.S.C. 2254(d)(1) 29
28 U.S.C. 2254(i) 26
28 U.S.C. 2255 ..... 1, 11, 12, 16, 21
Fed. R. Civ. P.:
Rule 41(b) 18
Rule 60 8
Rule 60(a) 8
Rule 60(b) ..... *passim*
Rule 60(b)(3) 8
Rule 60(b)(6) 29
Rule 81 11
Rule 81(a)(2) 11
Fed. R. Crim. P. 6(e) 15
Rules Governing Section 2254 Cases, Rule 11 11
Rules Governing Section 2255 Proceedings, Rule 12 12
Fla. R. Crim. P. 3.850 13

In the Supreme Court of the United States

No. 04-6432

AURELIO O. GONZALEZ, PETITIONER

v.

JAMES V. CROSBY, JR., SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case concerns whether and to what extent the limitations imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, on the filing of second or successive federal habeas corpus applications apply to motions for relief from judgment under Federal Rule of Civil Procedure 60(b). The United States was a party to the consolidated en banc proceedings below. See *Lazo* v. *United States*, No. 02-12483; J.A. 29-32. Because AEDPA's limitations on second or successive habeas corpus applications generally apply to collateral review of federal criminal convictions under 28 U.S.C. 2255, see J.A. 35, the United States has a substantial interest in this case.

STATEMENT

1. a. Under 28 U.S.C. 2254, state prisoners may obtain collateral review of their criminal convictions by filing an application for a writ of habeas corpus in federal district court. Prisoners, however, must first exhaust available state court remedies. 28 U.S.C. 2254(b)(1)(A) and (c); see generally *Rhines* v. *Weber*, No. 03-9046 (Mar. 30, 2005). Title I of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1217, worked substantial changes in the availability of federal habeas corpus relief. See generally *Felker* v. *Turpin*, 518 U.S. 651, 656 (1996). Of relevance here, Section 106 of AEDPA (codified at 28 U.S.C. 2244) imposed strict constraints on the filing of repeat—second or successive—challenges to state convictions, creating a "modified res judicata rule" for federal habeas corpus proceedings. *Felker*, 518 U.S. at 664. Section 2244(b)(1) imposes an absolute bar on a habeas corpus application that raises claims that were already presented in a prior application. With respect to claims that were not presented in the initial application, Section 2244(b)(2) requires their dismissal unless the new claim "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," 28 U.S.C. 2244(b)(2)(A), or "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence" and the facts underlying the claim could establish "by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense," 28 U.S.C. 2244(b)(2)(B)(i) and (ii).

AEDPA also imposed a one-year statute of limitations on filing applications for federal habeas corpus relief from state court convictions. See 28 U.S.C. 2244(d); *Pliler* v. *Ford*, 124 S. Ct. 2441, 2445 (2004); *Carey* v. *Saffold*, 536 U.S. 214, 220

(2002). Although there are limited exceptions, the time limit generally begins running at the conclusion of direct review of the criminal judgment. See 28 U.S.C. 2244(d)(1)(A). The running of the limitations period is tolled, however, during the pendency of "a properly filed application for State post-conviction or other collateral review." 28 U.S.C. 2244(d)(2).

b. Federal Rule of Civil Procedure 60(b) authorizes courts to relieve a party in civil litigation from a final judgment for six reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

2. a. In 1982, petitioner pleaded guilty in Florida state court to armed robbery, armed kidnapping, and armed burglary with a firearm. Pet. App. A4, at 2; J.A. 32.[1] He was sentenced to 99 years of imprisonment. J.A. 32. He did not appeal either the judgment of conviction or the sentence. *Ibid.* Fourteen years later, petitioner filed a collateral challenge to his conviction in Florida state court, see Fla. R. Crim. P. 3.850. J.A. 32. He alleged that newly discovered evidence demonstrated that his guilty plea was unknowing, unintelligent, and involuntary because counsel had advised

---

[1] The court of appeals' decision mistakenly lists the year as 1992. The correct date is 1982. Pet. App. A4, at 2; Pet. Br. 2.

him that he would serve no more than 13 years. *Ibid.* The state court denied relief, and the court of appeals affirmed. *Ibid.*; *Gonzalez* v. *State*, 692 So. 2d 900 (Fla. 3d Dist. Ct. App. 1997) (Table).

b. In June 1997, petitioner filed an application for habeas corpus under 28 U.S.C. 2254, repeating his claim that his plea was involuntary and unknowing. Pet. App. A4; J.A. 32. Petitioner amended his application to add claims that the sentencing court relied upon incorrect criminal records and did not sign the sentencing order. Pet. App. A6, at 1.

The district court dismissed the application as time-barred under 28 U.S.C. 2244(d)(1). Because petitioner's conviction became final before AEDPA but his application for habeas corpus relief was filed after AEDPA's enactment, petitioner was afforded a one-year grace period—the one year following AEDPA's effective date of April 24, 1996—in which to pursue relief under 28 U.S.C. 2254. Pet. App. A7, at 2-3. Petitioner's application for federal habeas corpus, however, was not filed until two months after the grace period expired. *Gonzalez* v. *Secretary for the Dep't of Corrections*, 317 F.3d 1308, 1310 (11th Cir.), vacated for reh'g en banc, 326 F.3d 1175 (2003), on reh'g en banc, 366 F.3d 1253 (2004), cert. granted, 125 S. Ct. 961 (2005).

The district court initially granted petitioner a certificate of appealability, 28 U.S.C. 2253(c), but the court of appeals vacated the certificate and remanded for clarification because the district court had not specified which issues satisfied the statutory criteria for appealability, see 28 U.S.C. 2253(c)(3). See J.A. 32. On remand, the district court denied petitioner a certificate of appealability. *Ibid.* On April 6, 2000, a judge of the court of appeals also denied petitioner a certificate of appealability. *Ibid.*

c. Eleven days later, on April 17, 2000, this Court granted review in *Artuz* v. *Bennett*, No. 99-1238, to address the proper application of AEDPA's provision tolling the

limitations period during the pendency of state post-conviction proceedings. See 529 U.S. 1065. Nevertheless, petitioner did not seek this Court's review of the dismissal of his application for habeas corpus or the denial of a certificate of appealability.[2] On November 7, 2000, this Court issued its decision in *Artuz*, holding that the requirement in the tolling provision that the application for state post-conviction relief be "properly filed" is satisfied when the application "is delivered to, and accepted by, the appropriate court officer for placement into the official record." 531 U.S. 4, 8 (2000). The Court rejected the argument that an application seeking review of claims that are procedurally defaulted under state law is not "properly filed," reasoning that the propriety of a filing turns upon "applicable laws and rules governing" the "delivery and acceptance" of pleadings, and not whether the claims contained in the application "are meritorious and free of procedural bar." *Id.* at 8-9.

3. Eight months after this Court's decision in *Artuz*, petitioner filed a motion under Federal Rule of Civil Procedure 60(b) for relief from the judgment dismissing his federal habeas corpus application on statute of limitations grounds. J.A. 13-20. Petitioner contended that, under *Artuz*, his state collateral challenge was "properly filed" and therefore tolled the running of the AEDPA limitations period. J.A. 18-19. The district court denied petitioner's motion for relief under Rule 60(b), J.A. 21, and declined to issue a certificate of appealability, J.A. 33. A judge of the court of appeals subsequently granted a certificate of appealability "on the issue of

---

[2] Petitioner could have filed a petition for a writ of certiorari asking the Court to hold the petition pending *Artuz*, or to grant review and hold that the certificate of appealability was improperly denied. See *Hohn* v. *United States*, 524 U.S. 236 (1998); Br. in Opp. 20 (listing cases where certiorari was granted to other prisoners denied certificates of appealability in cases implicating *Artuz*).

whether the district court's September 9, 1998 dismissal of [petitioner's] habeas petition was error." *Ibid.*

A panel of the court of appeals affirmed. *Gonzalez* v. *Secretary for the Dep't of Corrections*, *supra*. As an initial matter, the panel held that the certificate of appealability authorized appeal of an issue not properly before the court—the merits of the district court's 1998 dismissal of petitioner's Section 2254 application. The only issue on appeal, the panel explained, was the propriety of the district court's dismissal of Gonzalez's motion for relief under Rule 60(b). *Gonzalez*, 317 F.3d at 1310. The panel then held that a certificate of appealability would be required to appeal the denial of petitioner's Rule 60(b) motion. *Id.* at 1311-1312. In so ruling, the panel extended the court's earlier decision in *Lazo* v. *United States*, 314 F.3d 571 (11th Cir. 2002), vacated for reh'g en banc, 326 F.3d 1175 (2003), on reh'g en banc, 366 F.3d 1253 (2004), which had held that a certificate of appealability is required for a second or successive petition that is disguised as a Rule 60(b) motion—that is, a Rule 60(b) motion that directly attacks the underlying state court judgment of conviction rather than the district court's habeas decision. *Gonzalez*, 317 F.3d at 1311; see *Lazo*, 314 F.3d at 573. The panel concluded that the same requirement of a certificate of appealability should apply to Rule 60(b) motions that attack the merits of the federal court's habeas ruling. *Gonzalez*, 317 F.3d at 1312.

Finally, the panel denied petitioner a certificate of appealability. The panel did "not find it debatable among jurists of reason" that the denial of petitioner's Rule 60(b) motion was an abuse of discretion because, under circuit precedent, all Rule 60(b) motions were to be treated as second or successive petitions, and petitioner did not satisfy the statutory criteria for filing a second or successive application. *Gonzalez*, 317 F.3d at 1312 (citing *Mobley* v. *Head*, 306 F.3d 1096 (11th Cir. 2002), vacated for reh'g en banc, 326 F.3d 1175 (2003), on reh'g en banc, 366 F.3d 1253 (2004), cert. denied, 125 S. Ct. 965 (2005)). In addition, the panel concluded that, "even if pre-AEDPA law applied, it would still be clear that [petitioner's] Rule 60(b) motion was due to be denied." *Gonzalez*, 317 F.3d at 1312. The panel explained that "a change in the law standing alone was not a proper basis for Rule 60(b) relief absent extraordinary circumstances," and petitioner had failed to identify any such exceptional circumstances. *Ibid.* To the contrary, the court considered significant the "almost three year[]" time lag between the district court's denial of his habeas corpus application and the Rule 60(b) motion, because "[t]he longer the delay the more intrusive is the effort to upset the finality of the judgment." *Id.* at 1313 (quoting *Ritter* v. *Smith*, 811 F.2d 1398, 1402 (11th Cir.), cert. denied, 483 U.S. 1010 (1987)).

4. a. The court of appeals granted rehearing en banc, granted petitioner a certificate of appealability, and affirmed the district court's denial of his Rule 60(b) motion. J.A. 22-125. At the outset, the en banc court held that a certificate of appealability is required to appeal the dismissal of a Rule 60(b) motion in cases seeking review of both state convictions (under 28 U.S.C. 2254) and federal convictions (under 28 U.S.C. 2255). J.A. 36-43. The court granted petitioner a certificate of appealability because his underlying constitutional claim—that his guilty plea was neither knowing nor voluntary—was debatable among jurists of reason, and his challenge to the district court's dismissal of his habeas application on statute of limitations grounds was likewise reasonably debatable. J.A. 45-46.

With respect to the merits of the district court's denial of petitioner's motion, the court of appeals held that AEDPA "severely limit[s] the application of Rule 60(b) to habeas cases," J.A. 48, because AEDPA's "central purpose" was to enhance the finality of state and federal convictions and, to that end, to "greatly restrict the filing of second or succes-

sive petitions," J.A. 47. "Applying Rule 60(b) full throttle to final judgments in habeas cases," the court reasoned, "would essentially repeal the later-enacted AEDPA provisions." J.A. 49. The court accordingly held that Rule 60 motions are permissible only to correct clerical errors, Fed. R. Civ. P. 60(a), or to remedy fraud on the court, Fed. R. Civ. P. 60(b)(3). J.A. 63-64. In limiting Rule 60 motions to those two grounds, the court relied on *Calderon* v. *Thompson*, 523 U.S. 538 (1998), which had similarly limited a court's inherent authority to recall its mandate in habeas cases. See J.A. 58. Because Gonzalez's Rule 60 motion neither concerned clerical error or fraud nor satisfied the criteria for a second or successive petition, the court of appeals affirmed the district court's dismissal of the motion. J.A. 69-70.

b. With respect to the disposition of petitioner's case, Judge Tjoflat, joined by Judges Barkett and Wilson, dissented. J.A. 81-123, 124-125. The dissent would have held that AEDPA's limitations on second and successive filings do not apply because petitioner's Rule 60(b) motion did not directly attack the underlying state criminal conviction but, instead, focused on error allegedly committed in the federal proceedings. J.A. 99-101.

SUMMARY OF ARGUMENT

A central aim of AEDPA is to curtail serial federal court review of state-court convictions. To that end, AEDPA adopts a modified rule of res judicata for federal habeas judgments. The operation of Rule 60(b)'s general provisions for civil litigation must be subordinated to those specific statutory restrictions on second and successive applications for federal habeas corpus review. Any time a motion under Rule 60(b) seeks to reopen a prior habeas judgment either on the ground that the court committed legal error in holding that the prisoner's claims do not support federal relief or on the basis that new claims should be considered, the motion is

operating in territory covered by AEDPA, and Rule 60(b)'s more general provisions must give way. Even when a Rule 60(b) motion does not directly implicate AEDPA's terms, this Court's precedent makes clear that exercises of the courts' equitable discretion in habeas cases must be consonant with AEDPA's terms and purposes. Accordingly, federal habeas judgments should be reopened under Rule 60(b) only if there has been a substantial defect in the federal court's processes that goes to the integrity, fundamental reliability, and rudimentary fairness of the procedures by which the first habeas application was adjudicated. The type of error that may justify reopening, moreover, must not be so frequently occurring as to threaten, in practice, to circumvent AEDPA's constraints on federal review of criminal convictions.

Petitioner's Rule 60(b) motion is squarely foreclosed by AEDPA's categorical prohibition on applications that seek successive review of the same legal claims for relief, 28 U.S.C. 2244(b)(1). The district court has already held, as a matter of law, that petitioner's claims do not support federal relief from his conviction because they are barred by AEDPA's statute of limitations. That ruling was a final and dispositive determination that the claims presented in petitioner's habeas application do not support federal relief, and that judgment is fully subject to AEDPA's res judicata rules. Petitioner's argument that the case should be reopened—not because he is innocent and not because of any fundamental failure in the federal court's adjudicatory processes, but because the federal court allegedly made a mistake of law in applying AEDPA's limits on habeas review —represents precisely the type of reiterated review of habeas judgments that AEDPA proscribes.

There is no merit to petitioner's argument that the Due Process Clause of the Fifth Amendment and the Constitution's limitations on suspension of the writ of habeas corpus,

U.S. Const. Art. I, § 9, Cl. 2, compel reconsideration of his claims. Statutes of limitations, procedural default rules, and limitations on the retroactive application of constitutional rulings to cases on collateral review have long been applied by federal courts in habeas cases without constitutional incident. The privilege of seeking habeas relief is not a guarantee that all claims will be decided on their own terms or that all of the habeas court's rulings will be error free.

Finally, even if petitioner's Rule 60(b) motion were found not to be subject to AEDPA, the court of appeals' judgment should be affirmed. Intervening changes of law support relief under Rule 60(b) only in the most extraordinary circumstances, and they almost never should do so in habeas cases where they fail to satisfy AEDPA's specific provision regulating the consideration of certain new rules of constitutional law, 28 U.S.C. 2244(b)(2)(A). In this case, there are no extraordinary or extenuating circumstances that warrant relief. Indeed, when the federal court issued the habeas judgment of which he now complains, petitioner failed to seek this Court's review of that decision, even though the Court was actively considering the legal basis for that adverse judgment at the time. Rule 60(b) does not offer relief for parties who default on the normal avenues of appellate review.

ARGUMENT

A MOTION UNDER FEDERAL RULE OF CIVIL PROCEDURE 60(B) IS SUBJECT TO AEDPA'S LIMITATIONS ON SECOND AND SUCCESSIVE APPLICATIONS FOR HABEAS CORPUS IF THE MOTION CHALLENGES THE DISTRICT COURT'S HOLDING THAT FEDERAL RELIEF FROM THE CONVICTION IS UNAVAILABLE

A. AEDPA's Restrictions On Federal Court Review Of Second And Successive Applications Sharply Constrain Rule 60(b)'s Operation In Habeas Corpus Cases

1. Federal Rule of Civil Procedure 60(b) is a general rule embodying the courts' traditional authority to afford relief from their judgments, and it broadly governs most forms of civil litigation in the federal courts. See Fed. R. Civ. P. 81; *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 233-234 (1995). The Rule's operation, however, is subject to more specific limitations imposed by legislation. In particular, the Federal Rules of Civil Procedure expressly provide that they apply to habeas corpus proceedings only "to the extent that the practice in such proceedings is not set forth in statutes of the United States, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Proceedings." Fed. R. Civ. P. 81(a)(2). Accordingly, where the practice for habeas corpus proceedings is set forth by statute, that practice "takes precedence over the Federal Rules." *Browder* v. *Director, Dep't of Corrections*, 434 U.S. 257, 269 n.14 (1978).[3]

---

[3] See *Woodford* v. *Garceau*, 538 U.S. 202, 208 (2003); *Pitchess* v. *Davis*, 421 U.S. 482, 489 (1975) ("Since the exhaustion [of state remedies] requirement is statutorily codified [under Section 2254], even if Rule 60(b) could be read to apply to this situation it could not alter the statutory command."); Rule 11 of the Rules Governing Section 2254 Cases (the Federal Rules of Civil Procedure apply to Section 2254 cases only if "they

"The enactment of AEDPA in 1996 dramatically altered the landscape for federal habeas corpus petitions." *Rhines* v. *Weber*, No. 03-9046 (Mar. 30, 2005), slip op. 4. In AEDPA, Congress strictly limited the federal courts' authority to revisit the denial of an application for habeas relief. If a habeas corpus applicant files a successive application asking a federal court to reconsider granting relief on grounds that were already "presented in a prior application," 28 U.S.C. 2244(b)(1), AEDPA unconditionally commands dismissal. AEDPA also places significant limits on the consideration of new claims not previously presented to the federal court. In that setting, the application can be entertained only if it relies on a new rule of constitutional law that this Court has made applicable to cases on collateral review or on newly discovered evidence clearly demonstrating actual innocence. 28 U.S.C. 2244(b)(2).

Section 2244(b)'s strict limitations on second and successive claims are "grounded in respect for the finality of criminal judgments," and reflect "AEDPA's central concern that the merits of concluded criminal proceedings not be revisited in the absence of a strong showing of actual innocence." *Calderon* v. *Thompson*, 523 U.S. 538, 558 (1998). Congress recognized the "profound societal costs that attend the exercise of habeas jurisdiction." *Id.* at 554 (quoting *Smith* v. *Murray*, 477 U.S. 527, 539 (1986)). Indeed, "[f]inality is essential to both the retributive and the deterrent functions of criminal law." *Calderon*, 523 U.S. at 555. "Perpetual disrespect for the finality of convictions disparages the entire criminal justice system." *McCleskey* v. *Zant*, 499 U.S. 467, 492 (1991). Serial review denies closure for the victims, the public, and the government; discourages those convicted of crime from accepting responsibility for their crimes; and deprives the criminal law of the retributive certainty that is essential to its deterrent and punitive effect. See *id.* at 491; *Teague* v. *Lane*, 489 U.S. 288, 309 (1989) (plurality opinion) ("Without finality, the criminal law is deprived of much of its deterrent effect."). In addition, the more prolonged the review process, the greater the risk that the passage of time will preclude any retrial of the defendant and thus, "in practice," will "reward the accused with complete freedom from prosecution." *Engle* v. *Isaac*, 456 U.S. 107, 128 (1982). Repeated habeas corpus filings also consume significant governmental resources, with sharply diminishing returns in the vindication of fundamental constitutional rights or the protection of the innocent.

When state convictions are challenged on federal habeas review, enforcing finality rules and limiting federal court oversight "preserve[s] the federal balance" by respecting the States' "good-faith attempts to honor constitutional rights," as well as their "sovereign power to punish offenders." *Calderon*, 523 U.S. at 555-556 (quoting *Murray* v. *Carrier*, 477 U.S. 478, 487 (1986)). AEDPA's limitations on repetitive and piecemeal attacks on criminal convictions thus "further the principles of comity, finality, and federalism." *Williams* v. *Taylor*, 529 U.S. 420, 436 (2000); see *McCleskey*, 499 U.S. at 491 ("Finality has special importance in the context of a federal attack on a state conviction.").

Accordingly, to the extent that a motion under Rule 60(b) operates in territory covered by AEDPA—*i.e.*, it seeks either reconsideration of the court's holding that claims previously presented are insufficient to support federal relief or the consideration of new claims or new evidence—AEDPA supplants Rule 60(b), and further federal review is permissible only on AEDPA's terms. To hold otherwise would circumvent AEDPA's restrictions on relitigation. Indeed, for that same reason, this Court held that a prisoner's motion to recall a court of appeals' mandate on the basis of the merits

---

are not inconsistent with any statutory provisions"); Rule 12 of the Rules Governing Section 2255 Cases (same, for actions under 28 U.S.C. 2255).

of the underlying decision in a Section 2254 case must be treated as a second or successive habeas corpus application. "Otherwise, petitioners could evade the bar against relitigation of claims presented in a prior application, § 2244(b)(1), or the bar against litigation of claims not presented in a prior application, § 2244(b)(2)." *Calderon*, 523 U.S. at 553.[4]

The fact that the narrow "claim" presented in the Rule 60(b) motion does not itself attack the underlying state conviction does not lessen the threatened inroads on finality. *Calderon* made clear that AEDPA is concerned with whether the ultimate object of the application is to obtain another round of federal review of the criminal conviction, not with the formal procedural device employed. 523 U.S. at 553; cf. *Slack* v. *McDaniel*, 529 U.S. 473, 484 (2000) (to obtain certificate of appealability for alleged error in a procedural ruling, prisoner must show that reasonable jurists could disagree not only about the procedural judgment, but also, if the procedural ruling is overturned, about whether the petition states a valid claim of a denial of a constitutional right). In sum, a Rule 60(b) attack on a federal habeas court's reason for denying relief—whether the reason was based on a constitutional ruling or a holding of procedural default, nonretroactivity, or a statute of limitations bar—falls within the

[4] Even before AEDPA, courts of appeals recognized that Rule 60(b) motions in habeas cases should be subject to judicially prescribed limitations on second or successive petitions. See, *e.g.*, *Hunt* v. *Nuth*, 57 F.3d 1327, 1339-1340 (4th Cir. 1995), cert. denied, 516 U.S. 1054 (1996); *Behringer* v. *Johnson*, 75 F.3d 189, 190 (5th Cir.), cert. denied, 516 U.S. 1182 (1996); *Graham* v. *United States*, 72 F.3d 129 (6th Cir. 1995) (Table); *Guinan* v. *Delo*, 5 F.3d 313, 316 (8th Cir. 1993); *Bonin* v. *Calderon*, 59 F.3d 815, 847 (9th Cir. 1995), cert. denied, 516 U.S. 1051 (1996); *Scott* v. *Singletary*, 38 F.3d 1547, 1553 (11th Cir. 1994), cert. denied, 515 U.S. 1145 (1995); see also *Barrett* v. *United States*, 965 F.2d 1184, 1188 n.7 (1st Cir. 1992) (dicta); *Landano* v. *Rafferty*, 897 F.2d 661, 668 n.10 (3d Cir.), cert. denied, 498 U.S. 811 (1990).

scope of AEDPA. Accordingly, it must meet the standards and comply with the procedures governing a second or successive motion under AEDPA.

2. Petitioner contends (Br. 14-18) that Rule 60(b) has equivalent status to duly enacted legislation and thus that courts must strain to read AEDPA's restrictions on federal review in a way that preserves Rule 60(b)'s uncabined reach. That position is not sustainable. Unlike some other federal rules, Rule 60 has not been enacted into positive law.[5] AEDPA, in contrast, represents a comprehensive statutory revision of habeas practice and "greatly restricts the power of federal courts to award relief to state prisoners who file second or successive habeas corpus applications." *Tyler* v. *Cain*, 533 U.S. 656, 661 (2001). As a result, when a Rule 60(b) motion operates within AEDPA's realm—by seeking either to relitigate claims previously presented or to raise new claims—Rule 60(b)'s general provisions must yield to AEDPA's statutory limitations on serial habeas litigation.

Even if a particular application of Rule 60(b) would "not contravene the letter of AEDPA," federal courts must always exercise their discretion to extend collateral review of criminal convictions in a manner that is "consistent with the objects of [AEDPA]," and the larger societal interests in finality and closure. *Calderon*, 523 U.S. at 554; see *Rhines*, slip op. 5-6 (even though "AEDPA does not deprive district courts of th[e] authority" to grant stays, "it does circumscribe their discretion," which must be exercised in a manner "compatible with AEDPA's purposes"); *Felker* v. *Turpin*, 518 U.S. 651, 663 (1996) (AEDPA "inform[s]" exercise of this Court's original habeas jurisdiction even if it does not directly regulate it). The courts' discretion to grant re-

[5] See *United States* v. *Sells Eng'g, Inc.*, 463 U.S. 418, 438 (1983) (Federal Rule of Criminal Procedure 6(e), which governs grand jury secrecy, has been enacted into positive law).

lief under Rule 60(b) already is limited to "extraordinary circumstances." *Liljeberg* v. *Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988) (quoting *Ackerman* v. *United States*, 340 U.S. 193, 199 (1950)). But because Rule 60(b) motions in Section 2254 and Section 2255 cases almost invariably implicate Congress's interest in constraining serial federal review of criminal convictions, a prisoner must show more than just the usual "extraordinary" grounds for relief. He must also demonstrate that further review would not frustrate the finality, comity, and federalism purposes advanced by AEDPA.

As a general rule, that will occur only when the Rule 60(b) motion exposes a substantial defect in the court's processes that goes to the integrity, fundamental reliability, and rudimentary fairness of the procedures by which his first application was adjudicated. See pp. 24-28, *infra*. The type of error asserted, moreover, must be so infrequently occurring as not to threaten, in practice, to circumvent AEDPA's constraints on federal review of criminal convictions. For example, Rule 60(b) relief should remain available in Section 2254 and Section 2255 cases where fraud or a similar type of substantial defect in the court's adjudicatory processes pervaded and indelibly tainted the initial habeas proceedings, "calling into question the very legitimacy" and integrity of the judgment, *Calderon*, 523 U.S. at 557. But to allow federal re-review based on alleged legal or factual flaws in the merits of the district court's conclusion that federal habeas relief should be denied (i) would fail to respect Congress's determination, in AEDPA, that serial federal review of the same conviction should be strictly circumscribed, (ii) would ignore the principle that Rule 60(b) relief is supposed to be extraordinary and exceptional because of the need for stability and finality in judgments, and (iii) would disregard the profound costs to society, the justice system, and the effectiveness of the penal laws occasioned by the

multiplicitous relitigation on habeas of challenges to criminal convictions.

B. Petitioner's Rule 60(b) Motion Is A Prohibited Successive Habeas Application Because Petitioner Seeks To Relitigate Claims That The District Court Already Held Do Not Support Federal Relief Under Section 2254

1. A dismissal on statute of limitations grounds is a judgment on the merits that triggers AEDPA's limitations

Petitioner's Rule 60(b) motion does not present the type of extraordinary defect in the functioning of the federal court in the first habeas proceeding that can support another round of federal review of his state conviction "consistent with the objects of [AEDPA]." *Calderon*, 523 U.S. at 554. Quite the opposite, petitioner's motion simply asks the district court to reconsider its rejection of the claims made in his first application for habeas relief on the ground that the court committed error in finding that the claims were time-barred. The only justification advanced for doing so is not extraordinary; it is the quite ordinary argument that the court made a mistake of law. But that contention cannot obscure the fact that petitioner is still seeking relief based on the same claims—the alleged involuntariness of his plea and errors in his criminal history—and that he is protesting the habeas court's legal basis for rejecting them. Petitioner can no more resurrect those claims through a Rule 60(b) motion than he could through the filing of a new habeas application, which would unquestionably be barred as successive.

The essence of petitioner's argument is that the prior federal court denial of relief does not count—for purposes of characterizing the Rule 60(b) motion as successive—because the court denied relief on statute of limitations grounds. But statute of limitations rulings are an integral part of deter-

mining whether the claims presented support *federal* habeas relief from a state conviction. Judicially crafted limitations on federal review—such as procedural default rules, limitations on collateral review of Fourth Amendment claims, see *Stone* v. *Powell*, 428 U.S. 465 (1976), and the non-retroactivity doctrine, see *Teague* v. *Lane*, *supra*—may often conclusively bar federal relief from a conviction. The denial of habeas relief on such grounds constitutes the same type of final resolution of a petitioner's claim to federal relief as dismissals that rely upon the construction of particular provisions of the Bill of Rights. In short, "[t]he 'merits' of a claim are disposed of when it is refused enforcement," and "[a]n adjudication declining to reach such ultimate substantive issues may bar a second attempt to reach them in another court" as much as their actual decision. *Angel* v. *Bullington*, 330 U.S. 183, 190 (1947); see *Artuz*, 531 U.S. at 8-9 (equating a procedural bar determination with substantive consideration of the merits of a claim).

Indeed, the Federal Rules of Civil Procedure accord judgments based on statute of limitations grounds the same status and effect as other dispositions on the merits. See Fed. R. Civ. P. 41(b) ("Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits."). This Court, as well, has long recognized that denials of relief on statute of limitations grounds constitute final judgments on the merits and are entitled to res judicata effect. See *Plaut*, 514 U.S. at 228 ("The rules of finality, both statutory and judge made, treat a dismissal on statute-of-limitations grounds the same way they treat a dismissal for failure to state a claim, for failure to prove substantive liability, or for failure to prosecute: as a

judgment on the merits.").[6] No different rule applies in criminal cases.[7]

Furthermore, Section 2244's "modified res judicata rule," *Felker*, 518 U.S. at 664, does not turn on the legal basis for disposing of the case in the first round of collateral review. To the contrary, the statute turns solely on whether the claim for relief from the criminal conviction "was presented" in the prior application, in which case dismissal is mandatory, 28 U.S.C. 2244(b)(1), or "was not presented," in which case dismissal is mandatory unless the new claim falls within the

---

[6] See also *United States* v. *Oregon Lumber Co.*, 260 U.S. 290, 299-300 (1922) ("The defense of the statute of limitations is not a technical defense but substantial and meritorious," and "a decree dismissing a bill on the ground of lapse of time [is] a judgment upon the merits."). The courts of appeals are in accord. See, *e.g.*, *Ortiz-Cameron* v. *DEA*, 139 F.3d 4, 6 (1st Cir. 1998); *AmBase Corp.* v. *City Investing Co.*, 326 F.3d 63, 72 (2d Cir.), cert. denied, 540 U.S. 1017 (2003); *Witkowski* v. *Welch*, 173 F.3d 192, 200 (3d Cir. 1999); *Shoup* v. *Bell & Howell Co.*, 872 F.2d 1178, 1179 (4th Cir. 1989); *United States* v. *Land*, 213 F.3d 830, 834 (5th Cir. 2000), cert. denied, 532 U.S. 904 (2001); *Mitchell* v. *Chapman*, 343 F.3d 811, 820 (6th Cir. 2003), cert. denied, 124 S. Ct. 2908 (2004); *Reinke* v. *Boden*, 45 F.3d 166, 168 (7th Cir.), cert. denied, 516 U.S. 817 (1995); *Hillary* v. *TWA*, 123 F.3d 1041, 1044 (8th Cir. 1997), cert. denied, 522 U.S. 1090 (1998); *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1081 (9th Cir. 2003); *Murphy* v. *Klein Tools, Inc.*, 935 F.2d 1127, 1128-1129 (10th Cir.), cert. denied, 502 U.S. 952 (1991); *Murphy* v. *United States*, No. 99-5325, 2000 WL 274200, at *1 (D.C. Cir. Feb. 2, 2000), cert. denied, 530 U.S. 1248 (2000); *North Georgia Elec. Membership Corp.* v. *City of Calhoun*, 989 F.2d 429, 433 (11th Cir. 1993).

[7] See *United States* v. *Oppenheimer*, 242 U.S. 85, 87-88 (1916) ("[A] judgment for the defendant upon the ground that the prosecution is barred goes to his liability as matter of substantive law and one judgment that he is free as matter of substantive law is as good as another. A plea of the statute of limitations is a plea to the merits."); *United States* v. *Barber*, 219 U.S. 72, 78 (1911) ("[T]he plea of the statute of limitation * * * is directed to the merits of the case; and if found in favor of the defendant the judgment is necessarily an acquittal of the defendant of the charge, and not a mere abatement of the action.") (citation omitted).

narrowly prescribed exceptions for intervening rules of constitutional law or new evidence of actual innocence, 28 U.S.C. 2244(b)(2). Indeed, AEDPA *deleted* language from the predecessor version of Section 2244(b) that defined second and successive writs by considering whether there was "a hearing on the merits of an issue of law" that was actually "adjudicated." 28 U.S.C. 2244(b) (1994). Respondent's argument thus attempts to resuscitate statutory language that Congress specifically discarded.[8]

---

[8] This Court's decisions in *Slack* v. *McDaniel*, *supra*, and *Stewart* v. *Martinez-Villareal*, 523 U.S. 637 (1998), determined that a final dismissal with prejudice, not just presentation of the claim, is necessary before court-made or pre-AEDPA statutory limitations on subsequent applications for relief attach. *Slack*, 529 U.S. at 485-488 (dismissal without prejudice on exhaustion grounds does not trigger limits on subsequent petitions under pre-AEDPA law); *Stewart*, 523 U.S. at 643-644 (same, for dismissal without prejudice on ripeness grounds). In such circumstances, the Court concluded that the return to federal court functions effectively as a continuation of the original proceeding for relief, because the federal court never actually determined whether the claims presented would support federal relief from the conviction. *Slack*, 529 U.S. at 486 (at time of return to federal court, the viability of the claims as a basis for relief from the conviction "was unadjudicated on its merits"); *Stewart*, 523 U.S. at 643 (where prisoner returned to federal court after a dismissal without prejudice of claims based on ripeness grounds, there still "was only one application for habeas relief"). Indeed, the dismissal in each case, by its terms, "contemplated that the prisoner could return to federal court," *Slack*, 529 U.S. at 486; see *Stewart*, 523 U.S. at 640, and the Court stressed in *Stewart* that "[i]t is certain" that Martinez-Villareal's claim "would not be barred under any form of res judicata," 523 U.S. at 645. See also *Lebron-Rios* v. *United States Marshal Serv.*, 341 F.3d 7, 13 (1st Cir. 2003) (res judicata does not attach to dismissal without prejudice on exhaustion grounds); see generally *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 396 (1990) (dismissal without prejudice lacks res judicata effect). A dismissal with prejudice on statute of limitations grounds, by contrast, constitutes a final and dispositive adjudication on the merits of the question whether the claims presented support federal relief; res judicata attaches; and no later return to or revival of the claims in federal court is contemplated.

The costs of allowing repetitive litigation to the State, victims, courts, and society—*i.e.*, upsetting the finality of penal judgments, the danger that delayed relief will thwart retrial, and the resource drain on the courts—are exactly the same regardless of whether the first application was held insufficient on statute of limitations or constitutional grounds. When, as here, "lengthy federal proceedings have run their course and a mandate denying relief has issued," the "State's interests in finality are all but paramount." *Calderon*, 523 U.S. at 556, 557. At that point, unsettling longstanding and already repeatedly scrutinized criminal convictions "inflict[s] a profound injury to the 'powerful and legitimate interest in punishing the guilty,' * * * an interest shared by the State and the victims of crime alike." *Id.* at 556 (quoting *Herrera* v. *Collins*, 506 U.S. 390, 421 (1993)). Thus, both AEDPA's text and its animating purposes dictate that dismissal of an initial Section 2254 application on statute of limitations grounds—a merits-based judgment that the claims presented do not warrant federal relief—triggers Section 2244's restrictions on second or successive filings.[9]

---

[9] See *Murray* v. *Greiner*, 394 F.3d 78, 81 (2d Cir. 2005) ("We hold that dismissal of a § 2254 petition for failure to comply with the one-year statute of limitations constitutes an adjudication on the merits that renders future petitions under § 2254 challenging the same conviction 'second or successive' petitions under § 2244(b)."); *Altman* v. *Benik*, 337 F.3d 764, 766-767 (7th Cir. 2003) (same, for Section 2255); *United States* v. *Clark*, 203 F.3d 358, 370 n.13 (5th Cir. 2000) (describing a dismissal of a Section 2254 petition on statute of limitations grounds as a disposition on the merits), vacated on other grounds, 532 U.S. 1005 (2001); cf. *Henderson* v. *Lampert*, 396 F.3d 1049, 1053 (9th Cir. 2005) (procedural default ruling should be treated as a ruling on the merits for purposes of Section 2244(b)); *In re Abdur'Rahman*, 392 F.3d 174, 188-189 (6th Cir. 2004) (en banc) (Siler, J., dissenting) (same), petition for cert. pending, No. 04-1247

2. *An alleged mistake of law does not preclude operation of Section 2244(b)'s limitations on second or successive habeas applications*

Petitioner argues (Br. 25-38) that precluding relief under Rule 60(b) from the district court's denial of his first habeas application on statute-of-limitations grounds would violate the Due Process Clause of the Fifth Amendment and the Constitution's Suspension Clause, which petitioner reads (Br. 36) as mandating an actual "determination of the claims asserted."[10] But, if accepted, petitioner's argument would preclude the application of any statute of limitations to federal habeas corpus actions because any enforcement of that limitations period necessarily would entail disposing of the petition without determining the merits of the underlying constitutional claims. Furthermore, long before AEDPA, federal courts refused to decide the constitutional claims raised in a habeas petition if the prisoner procedurally defaulted those claims in state court, unless the prisoner also demonstrated cause and prejudice for the failure to press the issue.[11] Surely the Suspension Clause does not proscribe this Court's longstanding procedural default rules. There simply is no constitutional principle entitling every federal habeas corpus applicant to have every federal constitutional claim decided on its own terms at least once.

(filed Mar. 11, 2005); *Harvey* v. *Horan*, 278 F.3d 370, 379-380 (4th Cir. 2002) (same); *In re Cook*, 215 F.3d 606, 608 (6th Cir. 2000) (same); *Carter* v. *United States*, 150 F.3d 202, 205-206 (2d Cir. 1998) (same).

[10] The Due Process Clause provides that "[n]o person shall * * * be deprived of life, liberty, or property, without due process of law." U.S. Const. Amend. V. The Suspension Clause provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. Art. I, § 9, Cl. 2.

[11] See, *e.g.*, *Wainwright* v. *Sykes*, 433 U.S. 72, 87-90 (1977); *Ex parte Spencer*, 228 U.S. 652, 660-661 (1913).

Petitioner's contention (Br. 36-39) that the district court made a statutory construction error in denying relief does not change the constitutional equation. That circumstance, if given decisive significance, would constitutionalize every alleged misinterpretation of a limitations period and every debatable exhaustion ruling in federal habeas proceedings. See 28 U.S.C. 2244(d), 2254(b). Presumably, the same logic would extend to any error in applying the procedural default doctrine. Whatever else they may guarantee, neither the Suspension Clause nor the Due Process Clause is an insurance policy against legal error in adjudicating a habeas case.[12]

The writ of habeas corpus does not even serve as a guarantee against error in the original criminal case. The central lesson of *Teague* v. *Lane*, *supra*, is that "the purpose for which the writ of habeas corpus is made available" is to ensure the faithful application of the law "that prevailed at the time the original proceedings took place," 489 U.S. at 306 (plurality opinion), "not to provide a mechanism for the continuing reexamination of final judgments based upon later emerging legal doctrine," *Sawyer* v. *Smith*, 497 U.S. 227, 234 (1990).[13] And Congress has pursued the same policy in

---

[12] That is especially true in light of the fact that the Great Writ did not even extend to prisoners (like petitioner) detained under state law until nearly 100 years after the Constitution was adopted, see, *e.g.*, *McCleskey*, 499 U.S. at 478, and this Court's endorsement of constitutional challenges to state convictions on habeas did not emerge until the middle of the 20th century, *Felker*, 518 U.S. at 663. Indeed, this Court has "assume[d]" the applicability of the Suspension Clause to the current scope of the writ, *id.* at 663-664, but has not yet so held.

[13] See also *Tyler* v. *Cain*, *supra* (federal habeas relief unavailable for unconstitutional jury instruction); *Kuhlmann* v. *Wilson*, 477 U.S. 436, 448 n.8 (1986) (opinion of Powell, J.) (the scope of federal habeas jurisdiction involves "balancing competing interests" and thus sometimes withholds relief for constitutional claims "whether or not those claims are meritorious").

AEDPA by restricting federal habeas relief for a claim decided in state court to decisions that are contrary to, or an unreasonable application of, this Court's decisions at the time of the state court ruling, or that are based on an unreasonable determination of the facts. See 28 U.S.C. 2254(d). Under that standard, error alone is not enough to obtain relief. See, *e.g.*, *Williams* v. *Taylor*, 529 U.S. 362, 402-413 (2000); cf. *Brown* v. *Payton*, No. 03-1039, 2005 WL 645182, at *11 (Mar. 22, 2005) (Breyer, J., concurring) (recognizing Congress's direction "to defer to the reasonable conclusions of state-court judges" even if the state decision "likely" involved error).

Thus, neither the Suspension Clause nor the Due Process Clause is violated by tolerating legal error in the initial criminal trial or in the subsequent resolution of constitutional claims in state habeas proceedings. It follows that there is no sound reason for concluding that those provisions are violated by declining to remedy a belatedly exposed statutory-construction error in federal habeas review.

3. The court of appeals' test, limiting Rule 60(b) to instances of fraud and clerical error, is unduly narrow

a. In affirming the district court's judgment refusing Rule 60(b) relief, the court of appeals held that the availability of relief under Rule 60(b) turns exclusively on whether the prisoner's motion is based on clerical error or fraud in the habeas proceeding. J.A. 63-64. While the court of appeals' judgment is correct, its categorical prohibition on all other grounds for relief under Rule 60(b) goes too far. The correct test for determining whether a Rule 60(b) motion qualifies as a second or successive petition is whether the motion challenges the correctness of the underlying federal court judgment that the claims presented do not support habeas relief or seeks to obtain relief on the basis of new legal claims or new evidence. If the motion does so, it operates in

territory covered by AEDPA's modified res judicata rules and can proceed, if at all, only on AEDPA's terms. On the other hand, if the motion seeks relief predicated on the basis of an exceptional defect in the federal court's adjudicatory processes—an error that reflects a breakdown in the ordinary functioning of the court system, such that the initial judgment denying relief cannot be trusted or the prisoner otherwise did not receive a full and fair determination of whether his claims provide a basis for federal relief—then the Rule 60(b) motion does not trench upon either AEDPA's text or its purposes, and it can be resolved as an ordinary Rule 60(b) motion. Fraud generally will qualify as the type of fundamental defect in the federal court's proceedings that remains an appropriate subject for relief under Rule 60(b), because a Rule 60(b) motion based on fraud ordinarily does not directly implicate AEDPA's res judicata rule.[14] Res judicata historically has not attached to judgments procured through fraud, and neither the government nor the public has a legitimate interest in preserving the finality or durability of such judgments.[15]

But fraud is not the only type of non-clerical error that can occur in habeas cases and that falls outside of AEDPA's reach. For example, relief under Rule 60(b) may also be consonant with AEDPA where the court or the government failed to serve the prisoner with notice at a critical stage of the initial habeas proceeding and the prisoner, with

---

[14] The fraud must be based on a claim of serious perversion of the habeas court's own processes, cf. *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, 245 (1944), not a recycled allegation of a violation of disclosure duties in the underlying criminal case that the State allegedly failed to cure. A mere claim of a continuing violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963), will not constitute a valid Rule 60(b) claim. See *Alley* v. *Bell*, 392 F.3d 822, 831 (6th Cir. 2004).

[15] See, *e.g.*, *United States* v. *Beggerly*, 524 U.S. 38, 47 (1998); *Marshall* v. *Holmes*, 141 U.S. 589, 599-600 (1891).

diligence, could not have cured that defect independently, with the result that the prisoner was effectively deprived of his full statutory right to review under Section 2254 or Section 2255. See *Rodwell* v. *Pepe*, 324 F.3d 66, 70 (1st Cir.) (dicta), cert. denied, 540 U.S. 873 (2003). Relief would also be appropriate if there were an error in the execution of the judgment. See *United States* v. *Phillips*, 225 F.3d 1198, 1201 (11th Cir. 2000) (relief under Rule 60(b) granted where a technical error in remedy ordered by the court had previously denied the prisoner his right to appeal).[16] In short, in the wake of AEDPA, relief should remain available for Rule 60(b) motions that attack a fundamental irregularity in the procurement or integrity of the initial habeas judgment, but not for those that simply attack the correctness of the court's ultimate ruling. The latter ground is fully addressed and occupied by AEDPA.[17]

b. Petitioner (Br. 18-21), like the dissent below (J.A. 99-100), argues that the dividing line between Rule 60(b) motions subject to AEDPA and those that are not should be drawn based on whether the motion focuses on error in the

[16] Because Congress expressly provided that "[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under Section 2254," 28 U.S.C. 2254(i), similar missteps by counsel should not provide a basis for relief under Rule 60(b) either. Cf. *Coleman* v. *Thompson*, 501 U.S. 722 (1991).

[17] The court of appeals relied (J.A. 58) on this Court's decision in *Calderon*, which limited motions to recall the mandate in habeas cases to instances of fraud and clerical error, 523 U.S. at 557. *Calderon*, however, did not involve a prisoner's independent effort to obtain further judicial review of his conviction; it addressed a court's inherent authority, *sua sponte*, to recall its own mandate, a practice that is not directly regulated by AEDPA. See J.A. 78 (Edmonson, C.J., specially concurring in part and dissenting in part); J.A. 94-95 (Tjoflat, J., specially concurring in part and dissenting in part).

federal habeas proceedings or in the underlying state court proceeding. That is the wrong test.

First, petitioner's test is unworkable, because every successive petition attacking a state court conviction can be recast as error in the federal court's application of controlling law. Indeed, petitioner proves the point by arguing (Br. 42-44) that Rule 60(b) would be the appropriate vehicle for raising a claim that a death sentence is proscribed by *Atkins* v. *Virginia*, 536 U.S. 304 (2002). Although, under petitioner's approach, that Rule 60(b) motion would no doubt allege a fundamental error in the federal district court's proceedings, its substance would plainly make a frontal assault on the state court judgment. Thus, in practice, petitioner's proposed distinction would open the gate to relitigation of any claim of legal error by the habeas court.[18]

Second, Congress's concern in AEDPA was to restrict the *federal courts'* role in reviewing state convictions. AEDPA's

[18] The potential for abuse is real. See *Abdur'Rahman*, 392 F.3d at 184 (characterizing a procedural default ruling as "defective" because of the "unclear state of the law" at the time the district court ruled); *Hamilton* v. *Newland*, 374 F.3d 822, 824 (9th Cir. 2004) (court treats as a proper Rule 60(b) motion a prisoner's request that the district court "reach the merits of the same constitutional claims he had raised in the original petition," just because the prisoner added an admittedly insubstantial claim of "actual innocence" simply "as a procedural device to avoid the statute of limitations"), cert. denied, No. 04-7992, 2005 WL 517049 (Mar. 7, 2005); *Harris* v. *United States*, 367 F.3d 74, 80 (2d Cir. 2004) (treating failure of privately retained habeas counsel to raise a claim as going to "the integrity of Harris's habeas proceeding"). Petitioner's further suggestion that Rule 60(b) is necessary, in the *Atkins* hypothetical, to save AEDPA from unconstitutionality is unsound. If the scenario petitioner posits of state officials intent on going forward with a facially unconstitutional execution ever arises—and he cites no case where it has—then that will be the appropriate time for the Court to address whether 28 U.S.C. 2244(b)(1) applies to original petitions for habeas corpus in this Court, see *Felker*, 518 U.S. at 662-663, or would otherwise proscribe mandamus relief in those extraordinary circumstances.

res judicata rule thus trains on the federal court judgment itself. See 28 U.S.C. 2244(a) (focusing on whether the legality of detention has been determined once "by a judge or court of the United States"); 28 U.S.C. 2244(b) (regulating second and successive filings based on prior applications to federal courts under federal law). Accordingly, in determining whether a Rule 60(b) motion seeks to avoid AEDPA's restrictions on serial federal review, the controlling consideration is whether the motion challenges the correctness of the prior *federal* court disposition. That is precisely what petitioner's motion does: it falls squarely within AEDPA's text because it seeks reconsideration of the court's prior holding that the asserted claims do not support federal relief. Petitioner's test thus would thwart Congress's purpose to restrict sequential efforts to invoke federal habeas jurisdiction.

C. Petitioner Is Not Entitled To Relief Under Rule 60(b)

Even if the court of appeals erred in characterizing petitioner's Rule 60(b) motion as a second or successive application under Section 2244(b), the Eleventh Circuit's judgment should be affirmed because "[i]ntervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6)." *Agostini* v. *Felton*, 521 U.S. 203, 239 (1997); see also *Liljeberg*, 486 U.S. at 863-864.[19] Nothing in petitioner's case

[19] The court of appeals cases that have granted relief based on intervening law generally have insisted that the change in law be accompanied by extraordinary circumstances. See *Ritter* v. *Smith*, 811 F.2d 1398, 1401-1402 (11th Cir.) (Rule 60(b) relief warranted where a controlling decision of this Court intervened and (1) the judgment had not been executed; (2) there was only minimal delay between the entry of the judgment and the Rule 60(b) motion; and (3) the Court had granted certiorari in the case leading to the change in law specifically to address the court of appeals' decision in the movant's case), cert. denied, 483 U.S. 1010 (1987); *Overbee* v. *Van Waters & Rogers*, 765 F.2d 578, 580 (6th Cir. 1985) (state supreme court reversed itself within one year, and the judgment was not final when the plaintiff filed his Rule 60(b)(6) motion).

transforms *Artuz*'s statutory construction holding into the type of exceptional circumstance that would justify reopening his federal habeas case at this late date. Nor does petitioner make any claim of actual innocence. His guilt is plain, with his claims for relief focused on the length of his sentence.

While petitioner's application for federal habeas was rejected based on a statute of limitations holding that might now be incorrect under *Artuz*, that alone does not satisfy Rule 60(b). Petitioner was afforded a full and fair opportunity to brief the statute of limitations question and to try "to win his case." *Angel*, 330 U.S. at 189. He does not allege any extraordinary defect in or failure in the integrity of the federal court proceedings—there was no fraud or denial of fair notice, and the district court's ultimate disposition was not an unreasonable application of clearly established law. Cf. 28 U.S.C. 2254(d)(1). In the words of petitioner's own amicus (NACDL Br. 17), the alleged mistake of law did "not render erroneous anything about the *process* by which the district court rejected the petition" (emphasis added). Petitioner's reliance on an intervening decision therefore falls outside the ordinary scope of Rule 60(b).

Finally, even if an intervening decision could form a basis for Rule 60(b) relief, petitioner's failure to pursue ordinary corrective processes should disqualify him from that extraordinary remedy. Less than two weeks after petitioner was denied a certificate of appealability by the Eleventh Circuit, this Court granted certiorari in *Artuz*, *supra*, to address the very statute of limitations argument that petitioner now wishes to advance. But petitioner chose not to

pursue relief from this Court.[20] Petitioner had the opportunity to seek relief from the district court's statute of limitations ruling from this Court along with Mr. Bennett. But he was "content to drop [his claims] and let the intermediate adjudication stand. Now he wants an encore." *Angel*, 330 U.S. at 191. AEDPA forbids that, and nothing in the Constitution or federal law justifies invoking Rule 60(b) to permit it.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

CHRISTOPHER A. WRAY
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

PATRICIA A. MILLETT
Assistant to the Solicitor General

THOMAS M. GANNON
Attorney

APRIL 2005

---

[20] See note 2, *supra*; *Ackerman*, 340 U.S. at 198 (even where hindsight reveals that a failure to seek further review "was probably wrong," Rule 60(b) is not a mechanism for relieving parties of "free, calculated, deliberate choices"); cf. *O'Sullivan* v. *Boerckel*, 526 U.S. 838 (1999) (discussing state prisoner's general obligation to pursue discretionary review within the state court system); *Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394, 400-401 (1981) (no exception to res judicata principles for parties who fail to preserve their rights through appeal).

STATUTORY APPENDIX

SELECTED PROVISIONS OF 28 U.S.C. CHAPTER 153—HABEAS CORPUS

§ 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color

thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

* * * * *

§ 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be

appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if

the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

* * * * *

§ 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

§ 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall

discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURT

RULE 9. Delayed or Successive Petitions

(a) DELAYED PETITIONS. A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

(b) SUCCESSIVE PETITIONS. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

* * * * *

RULE 11. Federal Rules of Civil Procedure; Extent of Applicability

The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules.

RULES GOVERNING SECTION 2255 PROCEEDINGS FOR THE UNITED STATES DISTRICT COURT

RULE 9. Delayed or Successive Motions

(a) DELAYED MOTIONS. A motion for relief made pursuant to these rules may be dismissed if it appears that the government has been prejudiced in its ability to respond to the motion by delay in its filing unless the movant shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred.

(b) SUCCESSIVE MOTIONS. A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

* * * * *

RULE 12. Federal Rules of Criminal and Civil Procedure; Extent of Applicability

If no procedure is specifically prescribed by these rules, the district court may proceed in any lawful manner not inconsistent with these rules, or any applicable statute, and may apply the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure, whichever it deems most appropriate, to motions filed under these rules.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 60. Relief From Judgment or Order

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action

to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

* * * * *

Rule 81. Applicability in General

(a) To What Proceedings Applicable.

* * * * *

(2) These rules are applicable to proceedings for admission to citizenship, habeas corpus, and quo warranto, to the extent that the practice in such proceedings is not set forth in statutes of the United States, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Proceedings, and has heretofore conformed to the practice in civil actions.

* * * * *

(3)

No. 04-6432

Supreme Court, U.S.
FILED
FEB 28 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

Aurelio O. Gonzalez,

Petitioner,

v.

James V. Crosby.

On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* ABU-ALI ABDUR'RAHMAN IN SUPPORT OF PETITIONER

Pamela S. Karlan
559 Nathan Abbott Way
Stanford, CA 94305

Bradley S. MacLean
STITES & HARBISON PLLC
Suntrust Center, Ste. 1800
424 Church St.
Nashville, TN 37219

Thomas C. Goldstein
Amy Howe
(Counsel of Record)
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016
(202) 237-7543

William P. Redick, Jr.
P.O. Box 187
Whites Creek, TN 37189

February 28, 2005

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether the court of appeals erred in holding that, on habeas corpus, every Rule 60(b) motion (other than for fraud) constitutes a prohibited "second or successive" petition as a matter of law.

TABLE OF CONTENTS

QUESTION PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
INTEREST OF *AMICUS CURIAE* 1
SUMMARY OF THE ARGUMENT 2
ARGUMENT 4
I. Rule 60(b) Offers An Appropriate Safety Valve For Correcting A Narrow Class Of Errors That Might Otherwise Undermine The Integrity Of Habeas Proceedings. 4
A. *Amicus* Abdur'Rahman's Case Shows Why Rule 60(b) Relief Is Necessary to Remedy Legal Errors That Otherwise Deny Individuals Any Access to the Habeas Process 7
B. The Other Cases in Which Courts Have Granted Rule 60(b) Motions Offer Equally Compelling Justifications for Reopening Judgments. 12
II. Only The Functional Approach Strikes The Appropriate Balance Between Finality And Preventing Injustice. 19
A. Rule 60(b) Embodies Congress's Determination of How to Balance Finality and the Need to Prevent Injustice. 19
B. The Functional Approach Provides the Balance Sought By Congress in Rule 60(b). 20
C. The Functional Rule Is Eminently Manageable. 22
CONCLUSION 24

TABLE OF AUTHORITIES

Cases

Abdur'Rahman v. *Bell*, 2001 WL 1782874 (M.D. Tenn. Nov. 27, 2001) 11
Abdur'Rahman v. *Bell*, 226 F.3d 696 (CA6 2000) 9
Abdur'Rahman v. *Bell*, 392 F.3d 174 (CA6 2004) (en banc) 4, 5, 11, 12
Abdur'Rahman v. *Bell*, 534 U.S. 970 (2001) 10
Abdur'Rahman v. *Bell*, cert. dismissed, 537 U.S. 88 (2002) 1, 11
Abdur'Rahman v. *Bell*, 999 F. Supp. 1073 (M.D. Tenn. 1998) 1, 2, 8, 9
Abdur'Rahman v. *Bell*, cert. granted, 535 U.S. 1016 (2002) (No. 01-9094) 1
Abdur'Rahman v. *Bell*, slip op. (CA6 Jan. 18, 2002) (Nos. 98-6568/6569, 01-6504) 11
Abdur'Rahman v. *Bell*, slip op. (CA6 Mar. 5, 2003) (Nos. 02-6547 & -6548) 11
Abdur'Rahman v. *Bell*, slip op. (M.D. Tenn. Dec. 17, 2002) (No. 96-CV-380) 11
Apprendi v. *New Jersey*, 530 U.S. 466 (2000) 6
Balark v. *City of Chicago*, 81 F.3d 658 (CA7 1996) 4, 20
Banks v. *United States*, 167 F.3d 1082 (CA7 1999) (per curiam) 13
Barrett v. *Yearwood*, 83 Fed. Appx. 160 (CA9 2003) 16
Blakely v. *Washington*, 124 S. Ct. 2531 (2004) 6
Calderon v. *Thompson*, 523 U.S. 538 (1998) 4
Clark v. *Lewis*, 1 F.3d 814 (CA9 1993) 23
Devino v. *Duncan*, 215 F. Supp. 2d 414 (S.D.N.Y. 2002) 18
Frederick v. *United States*, 2000 U.S. Dist. LEXIS 20423 (N.D.N.Y. Dec. 18, 2000) 6

Funderburd-Day v. *Artuz*, 2002 U.S. Dist. LEXIS 20839 (S.D.N.Y. Aug. 28, 2002) 18
Garcia v. *Portuondo*, 104 Fed. Appx. 776 (CA2 2004) 13
Gaskins v. *Duval*, 336 F. Supp. 2d 66 (D. Mass. 2004) 21
Gonzalez v. *Secretary for the Department of Corrections*, 366 F.3d 1253 (CA11 2004) 4, 17, 19
Guinan v. *Delo*, 5 F.3d 313 (CA8 1993) 23
Hamilton v. *Newland*, 374 F.3d 822 (CA9 2004) 21, 22
Harris v. *United States*, 367 F.3d 74 (CA2 2004) 3
Howard v. *McAdory*, 2004 U.S. Dist. LEXIS 18527 (N.D. Ill. Sept. 13, 2004) 16
Hunt v. *Nuth*, 57 F.3d 1327 (CA4 1995) 23
In re Dennis, 209 B.R. 20 (Bankr. S.D. Ga. 1996) 20
In re Zimmermann, No. 24039-5-CH (Tenn. S. Ct. Disciplinary Bd. of Prof. Resp. May 28, 2002) 7
Johnson v. *Lehman*, 2004 WL 1368815 (E.D. Pa. June 15, 2004) 17, 18
Jones v. *State*, 1995 Tenn. Crim. App. LEXIS 140 (Tenn. Crim. App. Feb. 23, 1995) 8
Leuthavone v. *State*, 2003 U.S. Dist. LEXIS 24710 (D.R.I. Feb. 24, 2004) 13, 15
Liberatore v. *McGuiness*, 1998 U.S. Dist. LEXIS 22842 (S.D.N.Y. Oct. 7, 1998) 15
Liljeberg v. *Health Services Acquisition Corp.*, 486 U.S. 847 (1988) 21
Logan v. *United States*, 2005 WL 273118 (CA4 Feb. 4, 2005) (per curiam) 24
Mason v. *Johnson*, 2001 U.S. Dist. LEXIS 20825 (N.D. Tex. Dec. 13, 2001) 16
Matos v. *Portuondo*, 33 F. Supp. 2d 317 (S.D.N.Y. 1999) 15
Meserve v. *United States*, 2005 WL 217041 (D. Me. Jan. 24, 2005) 22

Mickens v. *United States*, 333 F. Supp. 2d 44 (E.D.N.Y. 2004) 5
Mitchell v. *Smith*, 115 Fed. Appx. 642 (CA4 2004) (per curiam) 16
Montalvo v. *Portuondo*, 1998 U.S. Dist. LEXIS 19137 (S.D.N.Y. Dec. 9, 1998) 18
Montalvo v. *Portuondo*, 2001 U.S. Dist. LEXIS 10686 (S.D.N.Y. July 30, 2001) 18, 19
Morales v. *Portuondo*, 154 F. Supp. 2d 706 (S.D.N.Y. 2001) 19
Morales v. *Portuondo*, 165 F. Supp. 2d 601 (S.D.N.Y. 2001) 19
O'Sullivan v. *Boerckel*, 526 U.S. 838 (1999) 9, 10
Panaro v. *Kelly*, 32 F. Supp. 2d 105 (W.D.N.Y. 1998) 15
Perez v. *United States*, 2003 WL 1845457 (N.D. Ill. Apr. 3, 2003) 6
Rashid v. *Kuhlman*, 2000 U.S. Dist. LEXIS 18212 (S.D.N.Y. Dec. 18, 2000) 15
Reinoso v. *Ortiz*, 1999 U.S. Dist. LEXIS 7768 (S.D.N.Y. May 25, 1999) 15
Robles v. *Senkowski*, 1999 U.S. Dist. LEXIS 11565 (S.D.N.Y. July 30, 1999) 14, 15
Rodriguez v. *Mitchell*, 252 F.3d 191 (CA2 2001) 3
Rodwell v. *Pepe*, 324 F.3d 66 (CA1 2003) 11
Rollen v. *United States*, 125 F. Supp. 2d 877 (C.D. Ill. 2000) 6
Ross v. *Artuz*, 150 F.3d 97 (CA2 1998) 14, 23
Sanders v. *McCaughtry*, 333 F. Supp. 2d 797 (E.D. Wis. 2004) 21
Shortt v. *Roe*, 2003 WL 21259795 (CA9 May 28, 2003) 18
State v. *Jones*, 789 S.W.2d 545 (Tenn. 1990) 9
Tal v. *Miller*, 1999 U.S. Dist. LEXIS 652 (S.D.N.Y. Jan. 25, 1999) 15

Telesford v. *United States*, 2004 WL 724959 (D. Del. Mar. 31, 2004) 22
United States v. *Bailey*, 2002 WL 31779911 (N.D. Ill. Dec. 11, 2002) 21
United States v. *Booker*, 125 S. Ct. 738 (2005) 6
United States v. *Brown*, 179 F.R.D. 323 (D. Kan. 1998) 16
United States v. *Lightfoot*, 2004 WL 2360373 (W.D. Wis. Oct. 13, 2004) 6
United States v. *Madrigal-Trujillo*, 2004 WL 1908210 (N.D. Tex. Aug. 24, 2004) 6
Velasquez v. *United States*, 1998 U.S. Dist. LEXIS 12220 (S.D.N.Y Aug. 10, 1998) 15
Whitmore v. *Avery*, 179 F.R.D. 252 (D. Neb. 1998) 15
Williams v. *Whitley*, 994 F.2d 226 (CA5 1993) 23

Statutes

28 U.S.C. 2244(d) 14
28 U.S.C. 2254(c) 9

Other Authorities

ADMINISTRATIVE OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS 5, 22, 23
Brief *Amici Curiae* of Former Prosecutors James F. Neal et al., *Abdur'Rahman* v. *Bell* (No. 01-9094) 7, 12
Brief of Petitioner, *Abdur'Rahman* v. *Bell* (No. 01-9094) 7, 8
John L. Costello, *Summary Denials of Relief Under Procedural Rules of Preclusion Are Deprivations of Due Process of Law*, 2 GEO. MASON U. CIV. RTS. L.J. 215 (1992) 4
Peter Hack, *The Roads Less Traveled: Post Conviction Relief Alternatives and the Antiterrorism and Effective Death Penalty Act of 1996*, 30 AM. J. CRIM. L. 171 (2003) 23

CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE (2d ed. 1995) 17, 20

Rules

Fed. R. Civ. P. 60(a) 17
Fed. R. Civ. P. 60(b) ..... passim
Tenn. R. App. P. 11 9
Tenn. S. Ct. R. 39 ..... 9, 10

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Abu-Ali Abdur'Rahman ("Abdur'Rahman") has a substantial interest in the outcome of this case, which will determine whether all motions under Federal Rule of Civil Procedure 60(b) ("Rule 60(b)"), including those that involve flaws in the habeas proceeding itself, are automatically barred.[2] The case may thus determine whether *amicus* lives or dies. Abdur'Rahman challenged his death sentence in a habeas petition that presented compelling evidence of gross prosecutorial misconduct during his trial. The district court never reached the merits of the bulk of those claims, however, because it misinterpreted a key provision of Tennessee law. As a result of this misinterpretation, the district court dismissed those claims for failure to exhaust state remedies. See *Abdur'Rahman* v. *Bell*, 999 F. Supp. 1073, 1080 (M.D. Tenn. 1998). Shortly thereafter, when the Tennessee Supreme Court issued a clarifying rule that made manifest the district

---

[1] The parties in this case have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party has authored this brief in whole or in part. Counsel for *amicus* were principally assisted by the following students in the Stanford Law School Supreme Court Litigation Clinic: Michael J. Mongan, C. Lee Reeves, and David B. Sapp. Clinic members Michael P. Abate, Eric J. Feigin, Nathaniel Garrett, Lauren Kofke, Rachel P. Kovner, and Julia M. Lipez also participated. The Stanford Law School Supreme Court Litigation Clinic has covered the costs connected with the brief.

[2] This Court previously considered Abdur'Rahman's case, which presented the almost identical question as the instant case. See *Abdur'Rahman* v. *Bell*, cert. granted, 535 U.S. 1016 (2002) (No. 01-9094). The Court later dismissed Abdur'Rahman's case as improvidently granted, presumably because of a perceived jurisdictional problem. See *Abdur'Rahman* v. *Bell*, 537 U.S. 88, 89 (2002) (Stevens, J., dissenting from dismissal as improvidently granted).

court's error, Abdur'Rahman, relying on Rule 60(b), timely moved to vacate the district court's judgment. *Id.* at 177-78. The en banc Sixth Circuit held that Abdur'Rahman's motion to reopen the judgment represented a proper use of Rule 60(b), and ordered the district court to consider Abdur'Rahman's claim on the merits. But should this Court adopt the Eleventh Circuit's essentially categorical ban on the use of Rule 60(b) in habeas proceedings, the review that the Sixth Circuit ordered in Abdur'Rahman's case might well be foreclosed, even though the sole reason the district court failed originally to address his claims on the merits was its own legal error in applying the procedural requirements of habeas law.

SUMMARY OF THE ARGUMENT

The courts of appeals are split on how to address Rule 60(b) motions in the habeas corpus context. The Eleventh and Tenth Circuits deem virtually all Rule 60(b) motions second or successive habeas petitions prohibited by the Anti-Terrorism and Effective Death Penalty Act (AEDPA). Contrary to the text and structure of Rule 60(b), which treats the listed reasons for reopening a judgment equally (with the one carefully delineated exception of setting a time limit with respect to three potential bases for relief), the Eleventh Circuit – perhaps recognizing the fundamental injustices a per se rule would cause – carves out one narrow exception, allowing habeas petitioners to proceed under Rule 60(b)(3) when they allege fraud on the court during the habeas proceeding itself. By contrast, the overwhelming majority of circuits have adopted and applied without difficulty a functional approach, which prohibits all Rule 60(b) motions that attack the underlying constitutionality of a conviction or sentence, but permits those that target an irregularity in the habeas

proceeding itself that fits within one of Rule 60(b)'s enumerated grounds.[3]

In his brief on the merits, petitioner Gonzalez explains persuasively why the Eleventh Circuit's holding that AEDPA prohibits almost all Rule 60(b) motions in the habeas context is erroneous. In this brief, *amicus* Abdur'Rahman offers another reason why Rule 60(b) motions should not be categorically precluded in the habeas context: in a very small but vitally important subset of cases, Rule 60(b) is the only avenue available to prevent a miscarriage of justice that Congress could not have intended *sub silentio* to render unremedied by AEDPA.

A thorough survey of all available habeas corpus cases decided since AEDPA's enactment revealed that habeas petitioners rarely file Rule 60(b) motions, and that courts have effectively policed those motions to ensure that they are not successive collateral attacks on convictions. Moreover, courts have only granted a handful of Rule 60(b) motions, usually when an error by the habeas court itself or a logistical snafu beyond the petitioner's control results in denial or dismissal of the habeas petition without any consideration of the merits of the underlying claim. The Eleventh Circuit's per se rule would indisputably prevent courts from granting relief in these meritorious cases.

The functional rule adopted by the majority of circuits is the best approach for evaluating Rule 60(b) motions in the post-AEDPA world. It furthers AEDPA's determination to strictly limit successive attacks on underlying criminal convictions, while allowing courts to reach the very small subset of meritorious cases in which the Rule 60(b) motion

---

[3] The Second Circuit has arguably adopted a more permissive rule, see *Rodriguez* v. *Mitchell*, 252 F.3d 191 (2001), but has more recently followed the functional approach, see *Harris* v. *United States*, 367 F.3d 74 (2004).

does not attack the underlying conviction and is the only avenue available to prevent a grave miscarriage of justice.

ARGUMENT

I. Rule 60(b) Offers An Appropriate Safety Valve For Correcting A Narrow Class Of Errors That Might Otherwise Undermine The Integrity Of Habeas Proceedings.

Federal Rule of Civil Procedure 60(b) authorizes district courts to set aside a final judgment and reopen proceedings under a carefully delineated set of circumstances. Rule 60(b) thus serves as a "safety valve," *Balark* v. *City of Chicago*, 81 F.3d 658, 663 (CA7 1996), that strikes a judicially proposed and congressionally ratified balance between finality and justice.

Although district courts seldom grant relief from a final judgment under Rule 60(b),[4] the cases in which relief is granted reflect a variety of compelling circumstances. This is particularly true for Rule 60(b) motions filed in the context of habeas proceedings.[5] In the nearly nine years since AEDPA's

---

[4] See John L. Costello, *Summary Denials of Relief Under Procedural Rules of Preclusion Are Deprivations of Due Process of Law*, 2 GEO. MASON U. CIV. RTS. L.J. 215, 233-34 (1992) (noting that less than fourteen percent of Rule 60(b) motions between 1955 and 1990 were granted).

[5] As an initial matter, AEDPA does not categorically foreclose the application of Rule 60(b) in habeas cases. Although the court below acknowledged that AEDPA's "second or successive petition restrictions are 'grounded in respect for the *finality of criminal judgments*,'" *Gonzalez* v. *Secretary for the Department of Corrections*, 366 F.3d 1253, 1271 (CA11 2004) (citing *Calderon* v. *Thompson*, 523 U.S. 538 (1998)) (emphasis added), it critically failed to recognize that Rule 60(b) motions do *not*, and *cannot*, attack the finality of criminal convictions. "Granting a second or successive habeas petition invalidates a prisoner's conviction and/or sentence. Granting a [true] Rule 60(b) motion has no such effect." *Abdur'Rahman* v. *Bell*, 392 F.3d 174, 180 (CA6 2004) (en banc). Because true Rule 60(b) motions merely attack a habeas judgment that "rests on a defective foundation," *id.* at 179, and cannot vacate an underlying criminal conviction, AEDPA does not foreclose all Rule 60(b) motions. Rather, as courts adopting the functional rule have discerned, AEDPA categorically precludes only Rule 60(b) motions that *attack the underlying conviction*.

effective date, roughly 330 such motions have been filed.[6] They thus involve only a minuscule fraction of all habeas cases.[7] But the twenty-seven[8] Rule 60(b) motions that have been granted, as well as the motion filed by *amicus* (which in the wake of the en banc court of appeals' ruling in his favor will now be the subject of ongoing proceedings in the district

---

[6] *Amicus* derived this figure from a survey of all published or unpublished decisions available through either Westlaw or Lexis in all circuit and district courts since AEDPA's effective date. This survey also captures references in the available opinions to Rule 60(b) motions disposed of in orders or opinions that are not themselves available through Westlaw or Lexis. Although *amicus*'s survey could not capture every Rule 60(b) motion filed since AEDPA's enactment (because some rulings are no doubt not available even electronically), *amicus* believes that his survey is the most comprehensive collection to date of Rule 60(b) motions filed in post-AEDPA habeas cases. Any references throughout this brief to data drawn from "available cases" refer to the results of this survey.

[7] The annual Federal Judicial Caseload statistics show that more than 20,000 habeas petitions are filed annually. See ADMINISTRATIVE OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS, Mar. 31, 2004, Table C-2, *available at* http://www.uscourts.gov/caseload2004/tables/C02Mar04.pdf.

[8] One case not included in this count is *Mickens* v. *United States*, 333 F. Supp. 2d 44 (E.D.N.Y. 2004), in which the habeas petitioner alleged that fraud had been committed on the habeas court – a scenario in which Rule 60(b) relief would be appropriate even under the Eleventh Circuit rule. The district court "grant[ed] Mickens' motion to the extent of an evidentiary hearing to develop what appear to be some of the missing facts" about whether his Rule 60(b) motion was time-barred. *Id.* at 49.

court), offer powerful examples of why the availability of Rule 60(b) relief is critical. Rule 60(b) does not permit challenges to the underlying conviction on the basis of mistake, excusable neglect, or changes in intervening law;[9] rather, it provides a mechanism for correcting egregious errors *only within the habeas process itself.* In the remainder of this section, *amicus* will describe both his case and the cases in which courts have reopened judgments pursuant to

---

[9] So, for example, courts have consistently denied motions for Rule 60(b) relief asserting that this Court's decisions in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), represent a change in governing law that would justify vacating already-entered judgments, and have treated such filings as successive collateral attacks instead. See, *e.g.*, *United States* v. *Lightfoot*, 2004 WL 2360373 (W.D. Wis. Oct. 13, 2004) (denying Rule 60(b) motion based on *Blakely* because it did not apply retroactively, and suggesting that at most such defendants might, if this Court were to hold its decision retroactive, be entitled to apply to the court of appeals for certification of a second post-conviction motion); *United States* v. *Madrigal-Trujillo*, 2004 WL 1908210 (N.D. Tex. Aug. 24, 2004) (treating Rule 60(b)(6) motion on *Blakely* grounds as a successive habeas petition); *Perez* v. *United States*, 2003 WL 1845457, at *3 (N.D. Ill. Apr. 3, 2003) (dismissing Rule 60(b) motion on *Apprendi* grounds, in part because the claim was "a successive collateral attack"); *Rollen* v. *United States*, 125 F. Supp. 2d 877, 878 (C.D. Ill. 2000) (denying Rule 60(b) motion on *Apprendi* grounds, both because it was untimely and because it represented "nothing more than an end run around the second or successive filing prohibition imposed by [AEDPA]"); *Frederick* v. *United States*, 2000 U.S. Dist. LEXIS 20423, at *5 (N.D.N.Y. Dec. 18, 2000) (denying Rule 60(b) motion on *Apprendi* grounds because "[t]his argument * * * does not challenge the propriety of the denial of his prior § 2255 claim * * * but rather alleges a new basis for collateral attack" and is therefore successive). Courts will no doubt follow the same approach in disposing of Rule 60(b) motions relying on this Court's decision in *United States* v. *Booker*, 125 S. Ct. 738 (2005).

Rule 60(b) to show that, while such cases are indeed rare, they reflect circumstances in which such relief is absolutely essential to protect the integrity of the habeas process.

A. *Amicus* Abdur'Rahman's Case Shows Why Rule 60(b) Relief Is Necessary to Remedy Legal Errors That Otherwise Deny Individuals Any Access to the Habeas Process.

Amicus Abdur'Rahman's case offers a textbook example of a circumstance in which the availability of Rule 60(b) relief is critical: cases in which a district court's legal error will otherwise foreclose a habeas petitioner from ever receiving a hearing on the merits of his underlying claim.

In 1987, Abdur'Rahman was tried in Tennessee state court for first-degree murder, assault with intent to murder, and armed robbery in connection with the stabbing death of Patrick Daniels, a Nashville drug dealer, and an assault on Daniels's girlfriend.[10] The prosecutor in his case was John Zimmermann, an assistant district attorney with a lengthy record of prosecutorial misconduct in other cases – including two public censures.[11] See, *e.g.*, *In re Zimmermann*, No. 24039-5-CH (Tenn. S. Ct. Disciplinary Bd. of Prof. Resp. May 28, 2002) (public censure of Zimmermann for misconduct in suppressing a detective's report that undermined his argument to the jury).

In *amicus*'s case, Zimmermann engaged in "the knowing suppression of favorable evidence" and the "knowing misrepresentation of evidence" on key issues. Br. *Amici*

---

[10] Both the facts of *amicus*'s case and a detailed description of his prosecutorial misconduct claims are laid out in greater detail in Brief of Petitioner, *Abdur'Rahman* v. *Bell* (No. 01-9094).

[11] For a more complete description of Zimmermann's extensive history of prosecutorial misconduct, including other findings by courts and disciplinary officials that Zimmermann's actions violated basic ethical standards and constitutional norms, see Brief *Amici Curiae* of Former Prosecutors James F. Neal et al. 13-14, *Abdur'Rahman* v. *Bell* (No. 01-9094).

Curiae of Former Prosecutors James F. Neal et al. 6-7, *Abdur'Rahman* v. *Bell* (No. 01-9094). His prejudicial suppression and misrepresentation of evidence affected virtually every major aspect of the case, including "the identity of the person who did the stabbing; the circumstances of a prior homicide used as an aggravating circumstance in support of the death penalty; and Petitioner's mental condition, a condition that should have been presented to the jury in mitigation of the death sentence." *Id.* 4.

The evidence of Zimmermann's misconduct is substantial. It includes, for example, evidence that he withheld relevant statements by the victim's brother, laboratory reports of cocaine in the victim's blood, and records regarding the victim's bank account. He withheld information regarding *amicus*'s mental state from, and misrepresented that information to, *amicus*'s court-ordered evaluators, his counsel, the court, and the jury. He also misled and withheld information from Abdur'Rahman's evaluators, counsel, and the jury regarding his 1972 murder conviction. He improperly manipulated the trial testimony of both Norma Norman, the surviving witness, and *amicus*'s co-defendant, Devalle Miller. And he made material misrepresentations to the jury, regarding information that he knew to be untrue, in his closing argument. See *Abdur'Rahman* v. *Bell*, 999 F. Supp. 1073, 1082-84, 1088-90 (M.D. Tenn. 1998) (noting illustrative claims); see also Br. of Petitioner, *Abdur'Rahman* v. *Bell* 18-20 (No. 01-9094) (describing some claims).

After discovering this and other troubling evidence of Zimmermann's misbehavior, Abdur'Rahman pursued his prosecutorial misconduct claims in precise conformity with state and federal law. He first sought state post-conviction relief in the trial court, which rejected all of his claims. He appealed as of right to the Tennessee Court of Criminal Appeals, which affirmed. *Jones* v. *State*, 1995 Tenn. Crim. App. LEXIS 140, at *7 (Tenn. Crim. App. Feb. 23, 1995). Then, *following the dictates of Tennessee law*, he sought permission to appeal to the Tennessee Supreme Court on

some of his claims, but not on the bulk of his prosecutorial misconduct claims, because those claims did not satisfy the narrow screening criteria imposed by Tennessee Rule of Appellate Procedure ("TRAP") 11.[12] The Tennessee Supreme Court denied Abdur'Rahman leave to appeal on the remaining claims. *State* v. *Jones*, 789 S.W.2d 545 (Tenn. 1990).

Having exhausted his state court options, Abdur'Rahman next presented his federal constitutional claims in an application for a writ of habeas corpus. See *Abdur'Rahman* v. *Bell*, 999 F. Supp. 1073 (M.D. Tenn. 1998). Although the district court vacated Abdur'Rahman's death sentence on the grounds of ineffective assistance of counsel, it declined to consider most of his prosecutorial misconduct claims as an additional ground for sentencing relief. *Id.* at 1077. The district court found that these claims were procedurally barred. It reasoned that, despite the language of TRAP 11, "a petitioner must seek discretionary review of a claim from a state's highest court in order to satisfy the exhaustion requirement." *Id.* at 1080.

On appeal, the Sixth Circuit sua sponte reversed the district court's finding that *amicus* had been prejudiced by the ineffective assistance of his counsel, reinstated *amicus*'s death sentence, and rejected all of his other claims. See *Abdur'Rahman* v. *Bell*, 226 F.3d 696 (2000).

Abdur'Rahman filed a timely petition for a writ of certiorari from this Court, seeking review of the Sixth Circuit's decision. While that petition was pending, the Tennessee Supreme Court adopted its Rule 39,[13] which

---

[12] These circumstances include: "(1) the need to secure uniformity of decision, (2) the need to secure settlement of important questions of law, (3) the need to secure settlement of questions of public interest, and (4) the need for exercise of the Supreme Court's supervisory authority." TRAP 11(a).

[13] As the Advisory Committee Note to TRAP 11 indicates, Rule 39 was a direct response to this Court's decision in *O'Sullivan*

explicitly "clarif[ied]" Tennessee's then-existing law regarding the obligation of litigants to seek discretionary review in the Tennessee Supreme Court to satisfy the requirement of exhausting state remedies. Rule 39 expressly applied to "all appeals from criminal convictions or post-conviction matters from and after July 1, 1967." And it provided, in relevant part, that after an adverse decision from the Tennessee Court of Criminal Appeals, litigants "shall not be required to * * * file an application for permission to appeal" to the Tennessee Supreme Court "in order to be deemed to have exhausted all available state remedies." Instead, the rule explains, as long as "the claim has been presented to the Court of Criminal Appeals, * * * the litigant shall be deemed to have exhausted all state remedies available for that claim."

Rule 39's clarification of Tennessee law of course completely undermined the federal district court's assertion that Abdur'Rahman's prosecutorial misconduct claims were procedurally defaulted. Abdur'Rahman had squarely presented those claims to the Tennessee Court of Criminal Appeals, which had decided them on the merits.

Less than forty-eight hours after this Court denied his petition for certiorari seeking review of the Sixth Circuit's decision reinstating his death sentence, *Abdur'Rahman* v. *Bell*, 534 U.S. 970 (2001), Abdur'Rahman returned to the district court and advised the court that he would file a motion for relief under Rule 60(b), on the ground that, in light of Tennessee Supreme Court Rule 39, his prosecutorial misconduct claims should have been considered on the merits. He filed the motion shortly thereafter.

---

v. *Boerckel*, 526 U.S. 838 (1999), holding that 28 U.S.C. 2254(c) requires "state prisoners to file petitions for discretionary review when that review is part of the ordinary appellate review procedure in the State," but that "nothing * * * requires the exhaustion of any specific state remedy when a State has provided that that remedy is unavailable." 526 U.S. at 847.

The district court responded that it could not consider Abdur'Rahman's motion because, under extant Sixth Circuit precedent, a "Rule 60(b) Motion must be construed as an attempt by the petitioner to file a second or successive [habeas] petition." *Abdur'Rahman* v. *Bell*, 2001 WL 1782874, at *1 (M.D. Tenn. Nov. 27, 2001). The Sixth Circuit agreed with the district court and affirmed. *Abdur'Rahman* v. *Bell*, slip op. (CA6 Jan. 18, 2002) (Nos. 98-6568/6569, 01-6504). This Court granted certiorari to consider, inter alia, a question nearly identical to the one presented by this case. But after briefing and oral argument, it dismissed the writ as improvidently granted. See *Abdur'Rahman* v. *Bell*, 537 U.S. 88, 89 (2002).

After this Court's dismissal order (apparently because it was concerned that no final appealable judgment existed in the case), *amicus* remedied that perceived procedural defect by reinstituting his request for Rule 60(b) relief. He refiled his Rule 60(b) motion in the district court, which again deemed the motion a "second or successive" habeas petition that it was powerless to consider. In what it described as a "final Order in all respects," the district court transferred the motion to the Sixth Circuit. See *Abdur'Rahman* v. *Bell*, slip op. (M.D. Tenn. Dec. 17, 2002) (No. 96-CV-380). The Sixth Circuit denied *amicus*'s application for a Certificate of Probable Cause or, alternatively, Certificate of Appealability, as well as his motion to re-transfer the matter back to the district court. *Abdur'Rahman* v. *Bell*, slip op. (CA6 Mar. 5, 2003) (Nos. 02-6547/6548).

On rehearing en banc, the Sixth Circuit rejected its earlier per se position on Rule 60(b) motions. Instead, it adopted the functional approach, which it regarded as better "preserv[ing] the independent goals of both Rule 60(b) and AEDPA." *Abdur'Rahman* v. *Bell*, 392 F.3d 174, 182 (2004). It added that "we should be 'confident that * * * [district courts will] be able to sift wheat from chaff without undue difficulty.'" *Id.* (quoting *Rodwell* v. *Pepe*, 324 F.3d 66, 71 (CA1 2003)).

Applying the functional rule to Abdur'Rahman's case, the court found that his Rule 60(b) motion was not a second or successive habeas petition because it "relat[ed] to the integrity of the federal habeas judgment and specifically, the basis for the district judge's procedural default ruling." 392 F.3d at 182. Moreover, because the district judge's ruling rested on "faulty ground" – "because Abdur'Rahman was never required to seek discretionary review of his prosecutorial misconduct claims in the Tennessee Supreme Court" – Abdur'Rahman's motion presented the kind of "extraordinary circumstances" necessary to justify Rule 60(b) relief. *Id.* at 186. Accordingly, the en banc panel reversed and remanded for the district court to consider the Rule 60(b) motion on the merits. *Id.* at 187.

If this Court adopts the "functional" approach employed by the majority of circuits, Abdur'Rahman's substantial evidence of prosecutorial misconduct – which other former prosecutors have deemed "a gross deviation from the standards of the legal profession," see Br. *Amici Curiae* of Former Prosecutors James F. Neal et al. 6 – can finally be reviewed on the merits by a federal habeas court. By contrast, if this Court were to adopt the Eleventh Circuit's rule, Abdur'Rahman's claims of grave prosecutorial misconduct may not receive even an instant of federal habeas scrutiny because the federal district court erroneously construed Tennessee post-conviction law. Nothing in either Rule 60(b) or AEDPA compels such an illogical, unnecessary, and unjust result.

B. The Other Cases in Which Courts Have Granted Rule 60(b) Motions Offer Equally Compelling Justifications for Reopening Judgments.

The remaining habeas cases in which Rule 60(b) relief has been granted in the wake of AEDPA fall essentially into three discrete categories. Each involves errors by the district court that go to an error in the federal habeas process because they

result in the district court dismissing a prisoner's petition without addressing the merits of his claim. One category reflects substantive mistakes of law, like the one that led the district court in Abdur'Rahman's case to mistakenly conclude that his claims were procedurally defaulted. A second category involves cases in which logistical snafus result in the unjustifiable dismissal of a prisoner's petition. And a third group of cases involves petitioners who *did* procedurally default on their claims but whose defaults were essentially induced by representations made by the habeas court. Indeed, even though the government itself sometimes concedes that the "safety valve" provided by Rule 60(b) is necessary,[14] the rule adopted by the Eleventh Circuit would deny relief in all of these compelling situations because none involved a "fraud" upon the court within the meaning of Rule 60(b)(3).[15]

1. Erroneous dismissal of a petition based on the habeas court's misreading of habeas law

The law governing a prisoner's ability to seek federal habeas relief is complex, particularly as it applies to such issues as procedural default, exhaustion, and the presence of

---

[14] See, *e.g.*, *Leuthavone* v. *State*, 2003 U.S. Dist. LEXIS 24710, at *7-*8 (D.R.I. Feb. 24, 2004) (noting that government did not oppose petitioner's Rule 60(b) motion to reopen the district court judgment to determine whether the original petition had been incorrectly dismissed as untimely); see also *Banks* v. *United States*, 167 F.3d 1082 (CA7 1999) (per curiam) (noting that the government did not oppose petitioner's Rule 60(b) motion because the integrity of the habeas proceeding may have been undermined).

[15] Nothing in AEDPA suggests that it was intended to overrule Rule 60(b) entirely. See *supra* n.5. Moreover, the Eleventh Circuit's rule would lead to the perverse result that states could rely on Rule 60(b) to reopen judgments favorable to habeas petitioners, see, *e.g.*, *Garcia* v. *Portuondo*, 104 Fed. Appx. 776 (CA2 2004) (ordering district court to grant state's Rule 60(b) motion, vacate its order for a new trial, and hold evidentiary hearing on whether new trial is necessary), while habeas petitioners with meritorious claims would be precluded from even seeking such relief.

adequate and independent state grounds for rejection of a defendant's federal constitutional claims. The passage of AEDPA added some additional intricacies. Thus, it is hardly surprising that district courts occasionally misconstrue these various requirements and dismiss habeas petitions as being procedurally barred even when they should have addressed them on the merits.

In addition to the cases of petitioner Gonzalez and *amicus* Abdur'Rahman, other habeas petitioners have been denied relief because courts have misconstrued the procedural requirements for obtaining review on the merits.[16] Roughly one quarter of all of the successful Rule 60(b) motions over the last nine years involve a particular error of this sort: an error concerning the statute of limitations to be applied to habeas petitions filed by prisoners convicted before the enactment of AEDPA. AEDPA introduced, for the first time, a statute of limitations in habeas cases, requiring that petitions be filed within one year of when the petitioner's conviction becomes final. See 28 U.S.C. 2244(d). Relying on AEDPA, several district courts within the Second Circuit dismissed habeas petitions filed by prisoners with convictions that antedated AEDPA because those petitions were filed more than a year after the convictions had become final. In *Ross* v. *Artuz*, 150 F.3d 97 (1998), however, the Second Circuit held that this approach misconstrued AEDPA and risked violating prisoners' rights to due process. And so the court decided that "prisoners whose convictions became final prior to the effective date of [AEDPA's] statute-of-limitations provision should have been allowed a period of one year after that effective date in which to file petitions." *Id.* at 98. In light of the decision in *Ross*, district courts within the circuit granted seven Rule 60(b) motions to reopen cases that had erroneously been dismissed as time-barred. See *Rashid* v. *Kuhlman*, 2000 U.S. Dist. LEXIS 18212 (S.D.N.Y. Dec. 18, 2000); *Robles* v. *Senkowski*, 1999 U.S. Dist. LEXIS 11565

[16] These cases likely fall under Rule 60(b)(1) or (6).

(S.D.N.Y. July 30, 1999); *Reinoso* v. *Ortiz*, 1999 U.S. Dist. LEXIS 7768 (S.D.N.Y. May 25, 1999); *Tal* v. *Miller*, 1999 U.S. Dist. LEXIS 652 (S.D.N.Y. Jan. 25, 1999); *Matos* v. *Portuondo*, 33 F. Supp. 2d 317 (S.D.N.Y. 1999); *Panaro* v. *Kelly*, 32 F. Supp. 2d 105 (W.D.N.Y. 1998); *Liberatore* v. *McGuiness*, 1998 U.S. Dist. LEXIS 22842 (S.D.N.Y. Oct. 7, 1998); see also *Velasquez* v. *United States*, 1998 U.S. Dist. LEXIS 12220 (S.D.N.Y Aug. 10, 1998) (granting Rule 60(b) motion because court had erroneously applied statute of limitations). One other successful Rule 60(b) motion also reopened a case wrongly dismissed on statute of limitations grounds. See *Leuthavone* v. *State*, 2003 U.S. Dist. LEXIS 24710 (D.R.I. Feb. 24, 2004) (granting Rule 60(b) motion because court erred in calculating the statute of limitations when pending state proceeding should have tolled the time limit).

Another example of a case in which Rule 60(b) was used to provide relief from a district court's legal error that resulted in the mistaken dismissal of a habeas petition on procedural grounds is *Whitmore* v. *Avery*, 179 F.R.D. 252 (D. Neb. 1998). In that case, the district court concluded that in a prior ruling, it had wrongly dismissed Whitmore's habeas petition without reaching the merits because the court had misconstrued the nature of his claim. See *id.* at 259 n.4 ("The petitioner's case should not have been dismissed at all, since his claim was not of the type that either had to be exhausted or could be exhausted."). Thus, it construed Whitmore's second filing (he was proceeding pro se) not as a successive habeas petition seeking review of its earlier, legally erroneous ruling, but as a Rule 60(b) motion seeking relief from the court's "error." *Ibid.* And it upheld the magistrate's recommendation that it grant the Rule 60(b) motion so that Whitmore could obtain a ruling on the merits of his claim that his representation at trial had been adversely affected by his lawyer's conflict of interest.

2. Erroneous dismissal based on logistical snafus

A second category of cases in which courts have reopened habeas proceedings involves prisoners whose habeas claims became procedurally defaulted – through no fault of their own – because of logistical snafus. These cases are contemplated by Rule 60(b)(1), which allows a court to set aside a decision because of "mistake" or "excusable neglect." In these cases, courts scrutinize motions for Rule 60(b) relief carefully but, if satisfied that the petitioner is truly without fault, they use Rule 60(b) to vacate the judgment dismissing a habeas petition, thereby permitting the petitioner to pursue his claim for relief.

For example, as described in *Mitchell* v. *Smith*, 115 Fed. Appx. 642 (CA4 2004) (per curiam), Mitchell's habeas petition was denied because he failed to file a timely objection to the magistrate's recommendation. Mitchell sought reconsideration under Rule 60(b), which the court subsequently granted because Mitchell had never received the magistrate judge's report. *Id.* at 643. For other cases granting Rule 60(b) relief to petitioners who never received notice, see *Barrett* v. *Yearwood*, 83 Fed. Appx. 160 (CA9 2003) (excusing petitioner's failure to timely respond to district court's order in light of multiple errors by clerk's office); *Mason* v. *Johnson*, 2001 U.S. Dist. LEXIS 20825 (N.D. Tex. Dec. 13, 2001) (granting Rule 60(b) motion to allow petitioner to file objections to magistrate's report when he had never received the report through prison mail system); *United States* v. *Brown*, 179 F.R.D. 323 (D. Kan. 1998) (granting Rule 60(b) motion to change date of denial of habeas petition to allow petitioner to appeal when he had never received notice of denial). Cf. *Howard* v. *McAdory*, 2004 U.S. Dist. LEXIS 18527 (N.D. Ill. Sept. 13, 2004) (granting Rule 60(b) motion because prison improperly refused to mail prisoner's habeas petition, thereby rendering petition untimely).

The Eleventh Circuit's per se rule would prohibit relief in this class of cases, even though the procedural bar to

reviewing the habeas petition on its merits arises only because of circumstances outside the petitioner's control. Although the Eleventh Circuit contemplated the availability of relief for "clerical errors in the judgment itself," pursuant to Rule 60(a), *Gonzalez*, 366 F.3d at 1278, the Eleventh Circuit rule would almost certainly preclude relief for cases in this category.[17] Again, nothing in either AEDPA or Rule 60(b) suggests that courts cannot reopen their judgments under these circumstances.

3. Procedural default produced by petitioner's reasonable reliance on a habeas court's representations regarding the law

A third category of cases in which Rule 60(b) has been used to reopen a judgment involves situations in which a district court's erroneous representation of the law leads a habeas petitioner to take actions that result in his claims being dismissed.[18] In such cases, courts have found that the petitioner's good faith reliance on the advice constitutes an exceptional circumstance that warrants reopening the case to prevent a miscarriage of justice.

Johnson v. *Lehman*, 2004 WL 1368815 (E.D. Pa. June 15, 2004), is illustrative. Johnson voluntarily dismissed his habeas petition without prejudice "at the court's urging" to exhaust his state remedies on all claims. *Id.* at *3. The dismissal was "explicitly premised on the concession by the

---

[17] *Amicus* has not located any case in which a court has construed such logistical snafus as "clerical errors" of the sort that would fall under Rule 60(a). Rather, courts considering Rule 60(a) motions construe the term "clerical error" much more narrowly – as covering, for example, mistakes in transcription, copying, and calculation in final decisions or orders. See 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2854, at 240 (2d ed. 1995).

[18] These cases fall under either Rule 60(b)(1) (court's mistake) or Rule 60(b)(6), as an extraordinary circumstance that would lead to injustice.

[government] that after exhausting state remedies, [p]etitioner could re-file the habeas petition, and it would not be treated as a successive petition under AEDPA." *Id.* at *2. Johnson subsequently filed a Rule 60(b) motion to reopen the dismissal order dismissing his petition, which the court granted. Rejecting the state's contention that Rule 60(b) motions are "unavailable to vacate a final judgment in a [habeas] action," *id.* at *1, it reasoned that relief was appropriate in light of Johnson's "reliance on the express instructions of the court" and subsequent circuit precedent holding that a stay – rather than dismissal – was the "appropriate course of action" in cases such as Johnson's. *Id.* at *10-*11.

Other cases presenting similar circumstances are *Shortt* v. *Roe*, 2003 WL 21259795 (CA9 May 28, 2003) (granting Rule 60(b) motion because petitioner sought remedy which was subsequently foreclosed by intervening authority); *Devino* v. *Duncan*, 215 F. Supp. 2d 414 (S.D.N.Y. 2002) (granting Rule 60(b) motion because the court had suggested that petitioner would retain the ability to refile his petition, but he was later barred from doing so); and *Funderbird-Day* v. *Artuz*, 2002 U.S. Dist. LEXIS 20839 (S.D.N.Y. Aug. 28, 2002) (presenting situation similar to *Devino*).

* * *

Thus, as far as *amicus* is aware from this survey of available cases, with only one exception,[19] all of the cases in

[19] The facts of that case are so unique, and compelling, that they militate strongly in favor of this Court preserving Rule 60(b) as a safety valve for exceptional cases. *Montalvo* v. *Portuondo*, 2001 U.S. Dist. LEXIS 10686 (S.D.N.Y. July 30, 2001), involved a petitioner who had been convicted of murder and sentenced to fifteen years to life. After Montalvo's habeas petition had been denied and he had been barred from appealing, see *Montalvo* v. *Portuondo*, 1998 U.S. Dist. LEXIS 19137, at *29 (S.D.N.Y. Dec. 9, 1998), he filed a Rule 60(b) motion to reopen his habeas proceeding to present evidence developed at a co-defendant's hearing. 2001 U.S. Dist. LEXIS 10686, at *3. At that hearing, a priest disclosed – and an attorney corroborated – that a deceased third person had confessed to committing the crime, and the court subsequently granted the co-defendant's writ of habeas corpus. See *Morales* v. *Portuondo*, 154 F. Supp. 2d 706 (S.D.N.Y. 2001). Because the priest and lawyer had not decided to come forward until after Montalvo's habeas proceeding, the district court granted his Rule 60(b) motion based on the "extraordinary circumstances" of the case. *Montalvo*, 2001 U.S. Dist. LEXIS 10686, at *3-*5 (S.D.N.Y. July 30, 2001). The court later granted Montalvo's writ of habeas corpus, ordered his immediate release, and barred the prosecutor from retrying him for the offense. *Morales* v. *Portuondo*, 165 F. Supp. 2d 601, 614-15 (S.D.N.Y. 2001).

which courts have granted Rule 60(b) motions involve flaws that infected the habeas proceeding itself, rather than problems in the underlying criminal case. Thus, *amicus*'s survey of Rule 60(b) motions highlights the shortcomings of the Eleventh Circuit's per se rule. The three principal categories outlined above are clearly covered by the plain language of Rule 60(b) and involve errors by the district court in the *process* – as opposed to the *substance* – of resolving the case. Nonetheless, the Eleventh Circuit's rule would categorically prevent Rule 60(b) relief in these meritorious cases.

II. Only The Functional Approach Strikes The Appropriate Balance Between Finality And Preventing Injustice.

A. Rule 60(b) Embodies Congress's Determination of How to Balance Finality and the Need to Prevent Injustice.

In holding that AEDPA precludes habeas petitioners from seeking Rule 60(b) relief except in the limited cases of fraud on the court, the Eleventh Circuit focused on what it regarded as AEDPA's "central purpose" of "ensur[ing] greater finality of state and federal court judgments in criminal cases." *Gonzalez*, 366 F.3d at 1269. But that myopic focus ignores

the role of the other provision of federal law at issue in this case: Rule 60(b).

Rule 60(b) represents Congress's attempt to strike a delicate balance between preserving the finality of judicial outcomes and the desire to ensure justice in individual cases, even when that justice can only be obtained by revisiting an otherwise settled decision. See 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2851, at 227 (2d ed. 1995). As the text of Rule 60(b) reflects, Congress struck the balance strongly in favor of finality – making relief from judgment available only in certain limited, clearly defined circumstances and within a fairly short time period – but it did not deem finality absolute. And Congress declined to draw the distinction, grafted onto Rule 60(b) by the Eleventh Circuit, between judgments based on mistake or excusable neglect and judgments based on clerical errors or fraud.

Consistent with this legislative intent, courts have employed Rule 60(b) as a narrow "safety valve" to prevent manifest injustice. *Balark* v. *City of Chicago*, 81 F.3d 658, 663 (CA7 1996); see *In re Dennis*, 209 B.R. 20, 28 (Bankr. S.D. Ga. 1996) ("Rule 60(b) provides a safety valve to ensure fairness in proceedings, but subject to time limits which are in place to assure some finality"). Contrary to both the text and intent of the Rule, the Eleventh Circuit's rule would close off this "safety valve."

B. The Functional Approach Provides the Balance Sought By Congress in Rule 60(b).

Only the functional approach attains the appropriate balance between finality and the need for individual justice that Congress intended in enacting Rule 60(b). The functional approach imposes two criteria that filter out all but the most deserving cases.

First, consistent with AEDPA, the functional approach screens out all claims except those attacking the integrity of habeas process, with – as discussed *supra* at 18 & n.18 – the

possible exception of the most compelling cases. When a Rule 60(b) motion is simply a collateral attack on the underlying criminal conviction, it will be treated as a second or successive habeas petition. Any fears that successive attacks on the underlying criminal conviction will be mistaken for true Rule 60(b) motions that attack *errors in the habeas proceeding itself* are misplaced.

Second, even when Rule 60(b) motions attack only the integrity of the habeas proceeding and thus clear the functional approach's first limiting principle, such motions will only be granted if they meet very strict standards imposed by Rule 60(b) itself. Thus, courts have repeatedly denied motions that run afoul of Rule 60(b)'s stringent time limits, even when they acknowledge that the motions might otherwise have been granted. See, *e.g.*, *Gaskins* v. *Duval*, 336 F. Supp. 2d 66, 69 n.1, 70 (D. Mass. 2004) (describing motion as "a true Rule 60(b) motion" before denying it as untimely); *Sanders* v. *McCaughtry*, 333 F. Supp. 2d 797, 799-800 (E.D. Wis. 2004) (finding that petitioner's "Rule 60(b) motion is not an attempt to circumvent AEDPA's restrictions on second or successive petitions," but denying it as untimely); *United States* v. *Bailey*, 2002 WL 31779911, at *1 (N.D. Ill. Dec. 11, 2002) ("Bailey's characterization [of his motion as a Rule 60(b) motion] should be accepted by this Court, rather than viewing his effort as a mislabeled Section 2255 motion[, but] any attempted Rule 60(b) motion would be far out of time.").

Courts adhering to the functional approach have also faithfully applied this Court's directive that Rule 60(b)(6), which allows relief for "any other reason justifying relief from the operation of the judgment," "should only be applied in 'extraordinary circumstances[.]'" *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847, 864 & n.10 (1988) (internal quotations and citation omitted). See, *e.g.*, *Hamilton* v. *Newland*, 374 F.3d 822, 823 (CA9 2004) (concluding that motion "should have been treated solely as a Rule 60(b)(6) motion," but "denying relief because * * * Hamilton could

not show any 'extraordinary circumstance' necessary to qualify for 60(b)(6) relief"); *Meserve* v. *United States*, 2005 WL 217041, at *1 n.2 & *5 (D. Me. Jan. 24, 2005) (describing Rule 60(b)(6) motion as a true 60(b) motion but denying it because "[t]his case is simply not one that involves exceptional or extraordinary circumstances"); *Telesford* v. *United States*, 2004 WL 724959, at *1 & *2 (D. Del. Mar. 31, 2004) (determining that Rule 60(b)(6) motion urging court to toll the habeas limitations period due to ineffective assistance of counsel was a "true Rule 60(b) motion," but denying it because a mistake by petitioner's attorney "regarding the one-year filing period does not constitute * * * 'extraordinary' actions").

C. The Functional Rule Is Eminently Manageable.

The functional approach is also administratively workable. As an initial matter, there is no reason to believe that a decision from this Court adopting the functional approach to Rule 60(b) motions in habeas cases will result in an influx of additional filings. In the circuits currently employing this approach, the incremental burden imposed by Rule 60(b) motions is negligible: a few hundred post-AEDPA cases involving Rule 60(b), see *supra* at 4, compared with more than 20,000 petitions for habeas corpus filed in 2004 alone, see ADMINISTRATIVE OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS, March 31, 2004, Table C-2, *available at* http://www.uscourts.gov/caseload2004/tables/C02Mar04.pdf.

Even in the Second Circuit – which at least nominally permits *all* Rule 60(b) motions (see *supra* n.3) – there is no indication that habeas prisoners have filed a significant number of such motions. *Amicus*'s review of the available Second Circuit cases revealed that courts within the Second Circuit had considered fewer than ninety Rule 60(b) motions in the entire eight-year period since AEDPA's enactment – a tiny fraction of the approximately 15,000 habeas petitions

filed in that circuit during the same period.[20] And if one removes the unusual line of cases arising out of *Ross* v. *Artuz*, described *supra* at 14-15, the Second Circuit has not granted materially more Rule 60(b) motions than the other circuits. To the contrary, like their counterparts in other circuits, the courts in the Second Circuit have exercised their authority under Rule 60(b) with extraordinary responsibility. See *supra* at 20-22.

Furthermore, cutting off the availability of Rule 60(b) for meritorious filings will not prevent frivolous claims. Rather, habeas petitioners will simply style their cause of action differently. See Peter Hack, *The Roads Less Traveled: Post Conviction Relief Alternatives and the Antiterrorism and Effective Death Penalty Act of 1996*, 30 AM. J. CRIM. L. 171, 213-22 (2003) (raising the prospect that prisoners could seek relief through a number of other avenues). In all events, under the Eleventh Circuit's rule, courts must still scrutinize each petition to sort out true claims of fraud from claims that more properly belong under other subheadings of the Rule.

Finally, experience has demonstrated that courts can apply the functional rule with ease in individual cases. That rule has a long-standing pedigree – indeed, several circuits adopted it prior to AEDPA's enactment[21] – and no problems with administrability have been reported by the courts that apply it. Courts are attentive to the fact that petitioners may not cloak a second or successive habeas petition in the

---

[20] See ADMINISTRATIVE OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS, March 31, 2004, Table C-3; March 31, 2003, Table C-3; March 31, 2002, Table C-3; March 31, 2001, Table C-3; January 31, 2000, Table C-3; January 31, 1999, Table C-3; March 31, 1998, Table C-3.

[21] See, *e.g.*, *Hunt* v. *Nuth*, 57 F.3d 1327, 1339 (CA4 1995); *Guinan* v. *Delo*, 5 F.3d 313, 316 (CA8 1993); *Clark* v. *Lewis*, 1 F.3d 814, 825 (CA9 1993); *Williams* v. *Whitley*, 994 F.2d 226, 230 n.2 (CA5 1993) (all embracing a functional approach to second or successive habeas petitions pre-AEDPA).

language of Rule 60(b) and are well prepared to quickly reject such motions. When courts conclude that the Rule 60(b) motion is in fact a collateral attack on the underlying conviction, they generally dispose of the cases in summary fashion. For example, the Fourth Circuit has made available numerous per curiam opinions dismissing appeals from district court denials of Rule 60(b) motions as successive. The text of these opinions varies scarcely at all, and the length of a typical decision is less than ten sentences. See, *e.g.*, *Logan* v. *United States*, 2005 WL 273118 (CA4 Feb. 4, 2005) (per curiam).

In sum, the functional approach has proved eminently workable, while at the same time allowing relief from fatally flawed dismissals of habeas petitions in a narrow class of cases. Thus, there is no reason in the text of AEDPA or Rule 60(b) to adopt the Eleventh Circuit's draconian rule.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

Pamela S. Karlan
559 Nathan Abbott Way
Stanford, CA 94305

Bradley S. MacLean
STITES & HARBISON PLLC
Suntrust Center, Ste. 1800
424 Church St.
Nashville, TN 37219

Thomas C. Goldstein
Amy Howe
(Counsel of Record)
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016
(202) 237-7543

William P. Redick, Jr.
P.O. Box 187
Whites Creek, TN 37189

February 28, 2005

No. 04-6432

IN THE

Supreme Court of the United States

AURELIO O. GONZALEZ,

Petitioner,

vs.

JAMES V. CROSBY, JR.,
Secretary, Florida Department of Corrections,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

KENT S. SCHEIDEGGER
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816

Phone: (916) 446-0345
Fax: (916) 446-1194
E-mail: cjlf@cjlf.org

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

QUESTION PRESENTED

Can Rule 60(b) of the Federal Rules of Civil Procedure be used to reopen a habeas corpus case after final disposition by the Court of Appeals, when (1) the petitioner cannot meet the criteria for a successive petition under AEDPA, and (2) the state-court judgment is not a miscarriage of justice under the pre-AEDPA case law standard?

TABLE OF CONTENTS

Question presented i

Table of authorities v

Interest of *amicus curiae* 1

Summary of facts and case 2

Summary of argument 3

Argument 4

I

The Federal Rules of Civil Procedure do not automatically apply to habeas cases 4

II

FRCP 60(b) does not apply to habeas cases where its effect is to evade the successive petition statute 7

A. Civil Rule 60 7

B. The successive petition rule 10

III

The state's legitimate interest in finality of the judgment is the starting point for determining when use of Rule 60(b) is contrary to the spirit of AEDPA 16

A. Finality and AEDPA 16

B. Applying *Harris* to Rule 60(b) 19

1. Mistake, inadvertence, surprise, and excusable neglect 19

2. Newly discovered evidence 20

3. Fraud on the court 20

4. Void judgment 21

5. Satisfaction, reversed prior judgment, prospective application 21

6. Catch-all 22

IV

There is no constitutional doubt in this case 27

V

Use of Rule 60(b) in the present case would be contrary to the spirit of AEDPA 29

Conclusion 30

TABLE OF AUTHORITIES

Cases

Abdur'Rahman v. Bell, 537 U. S. 88, 154 L. Ed. 2d 501, 123 S. Ct. 594 (2002) 16, 17

Ackermann v. United States, 340 U. S. 193, 95 L. Ed. 207, 71 S. Ct. 209 (1950) 22

Agostini v. Felton, 521 U. S. 203, 138 L. Ed. 2d 391, 117 S. Ct. 1997 (1997) 21

Andrews v. Deland, 943 F. 2d 1162 (CA10 1991) 13

Angel v. Bullington, 330 U. S. 183, 91 L. Ed. 832, 67 S. Ct. 657 (1947) 17

Artuz v. Bennett, 531 U. S. 4, 148 L. Ed. 2d 213, 121 S. Ct. 361 (2000) 2

Atkins v. Virginia, 536 U. S. 304, 153 L. Ed. 2d 335, 122 S. Ct. 2242 (2002) 25

Atlantic Coast Line R. Co. v. Locomotive Engineers, 398 U. S. 281, 26 L. Ed. 2d 234, 90 S. Ct. 1739 (1970) 8

Biggins v. Hazen Paper Co., 111 F. 3d 205 (CA1 1997) 25

Browder v. Director, Dept. of Corrections of Ill., 434 U. S. 257, 54 L. Ed. 2d 521, 98 S. Ct. 556 (1978) 6, 7

Calderon v. Thompson, 523 U. S. 538, 140 L. Ed. 2d 728, 118 S. Ct. 1489 (1998) 9, 14, 15, 19, 20, 27, 30

Coleman v. Thompson, 501 U. S. 722, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991) 20, 27

Duncan v. Walker, 533 U. S. 167, 150 L. Ed. 2d 251, 121 S. Ct. 2120 (2001) 9

Ex parte Cabrera, 4 F. Cas. 964 (No. 2278) (CCD Pa. 1805) 28

Ex parte Dorr, 44 U. S. (3 How.) 103, 11 L. Ed. 514 (1845) 28

Ex parte Watkins, 3 Pet. (28 U. S.) 193, 7 L. Ed. 650 (1830) 10

Fay v. Noia, 372 U. S. 391, 9 L. Ed. 2d 837, 83 S. Ct. 822 (1963) 27

Felker v. Turpin, 518 U. S. 651, 135 L. Ed. 2d 827, 116 S. Ct. 2333 (1996) 15, 17, 28

Gaca v. United States, 411 U. S. 618, 36 L. Ed. 2d 541, 93 S. Ct. 2156 (1973) 24

Gomez v. United States Dist. Court for the Northern Dist. of Cal., 503 U. S. 653, 118 L. Ed. 2d 293, 112 S. Ct. 1652 (1992) 13, 14

Gonzalez v. Crosby, 366 F. 3d 1253 (CA11 2004) 3, 4, 16

Gonzalez v. Secretary for the Dept. of Corrections, 317 F. 3d 1308 (CA11 2003) 3

Harris v. Nelson, 394 U. S. 286, 22 L. Ed. 2d 281, 89 S. Ct. 1082 (1969) 5, 19

Hess v. Cockrell, 281 F. 3d 212 (CA5 2002) 22

In re Abdur'Rahman, 392 F. 3d 174 (CA6 2004) 6

In re Hawthorne, 35 Cal. 4th 40, 24 Cal. Rptr. 3d 189, 105 P. 3d 552 (2005) 26

Kuhlmann v. Wilson, 477 U. S. 436, 91 L. Ed. 2d 364, 106 S. Ct. 2616 (1986) 12

Liberatore v. McGuiness, No. 96 Civ. 6943, 1998 U. S. Dist. LEXIS 22842 (SDNY, Oct. 7, 1998) 24

Liljeberg v. Health Services Acquisition Corp., 486 U. S. 847, 100 L. Ed. 2d 855, 108 S. Ct. 2194 (1988) 22

Lonchar v. Thomas, 517 U. S. 314, 134 L. Ed. 2d 440, 116 S. Ct. 1293 (1996) 15, 16, 27

Matos v. Portuondo, 33 F. Supp. 2d 317 (SDNY 1999) .. 23

McCleskey v. Zant, 499 U. S. 467, 113 L. Ed. 2d 517, 111 S. Ct. 1454 (1991) 10, 12

Pennsylvania Bureau of Correction v. United States Marshals Service, 474 U. S. 34, 88 L. Ed. 2d 189, 106 S. Ct. 355 (1985) 15

Penry v. Lynaugh, 492 U. S. 302, 106 L. Ed. 2d 256, 109 S. Ct. 2934 (1989) 26

Peterson v. Demskie, 107 F. 3d 92 (CA2 1997) 23

Pitchess v. Davis, 421 U. S. 482, 44 L. Ed. 2d 317, 95 S. Ct. 1748 (1975) 7

Plaut v. Spendthrift Farm, Inc., 514 U. S. 211, 131 L. Ed. 2d 328, 115 S. Ct. 1447 (1995) 17

Rancho Palos Verdes v. Abrams, 544 U. S. __ (No. 03-1601, Mar. 22, 2005) 5

Reno v. Flores, 507 U. S. 292, 123 L. Ed. 2d 1, 113 S. Ct. 1439 (1993) 27

Reyes v. Keane, 90 F. 3d 676 (CA2 1996) 24

Ritter v. Smith, 811 F. 2d 1398 (CA11 1987) 21, 22

Robles v. Senkowski, No. 97 Civ. 2798, 1999 U. S. Dist. LEXIS 11565 (SDNY, July 30, 1999) 24

Rodwell v. Pepe, 324 F. 3d 66 (CA1 2003) 18

Roper v. Simmons, 543 U. S. __
(No. 03-633, Mar. 1, 2005) 29

Rose v. Lundy, 455 U. S. 509, 71 L. Ed. 2d 379,
102 S. Ct. 1198 (1982) 10

Ross v. Artuz, 150 F. 3d 97 (CA2 1998) 23

Rumsfeld v. Padilla, 542 U. S. __, 124 S. Ct. 2711,
159 L. Ed. 2d 513 (2004) 21

Salinger v. Loisel, 265 U. S. 224, 68 L. Ed. 989,
44 S. Ct. 519 (1924) 11

Sanders v. United States, 373 U. S. 1, 10 L. Ed. 2d 148,
83 S. Ct. 1068 (1963) 11, 12

Slack v. McDaniel, 529 U. S. 473, 146 L. Ed. 2d 542,
120 S. Ct. 1595 (2000) 17, 19

Spencer v. Kemna, 523 U. S. 1, 140 L. Ed. 2d 43,
118 S. Ct. 978 (1998) 15

State v. Pierre, 572 P. 2d 1338 (Utah 1977) 13

Stewart v. Martinez-Villareal, 523 U. S. 637,
140 L. Ed. 2d 849, 118 S. Ct. 1618 (1998) 17

Teague v. Lane, 489 U. S. 288, 103 L. Ed. 2d 334,
109 S. Ct. 1060 (1989) 11, 18

Thompson v. Calderon, 151 F. 3d 918 (CA9 1998) 9

Tyler v. Cain, 533 U. S. 656, 150 L. Ed. 2d 632,
121 S. Ct. 2478 (2001) 13, 22

United States v. Scott, 437 U. S. 82, 57 L. Ed. 2d 65,
98 S. Ct. 2187 (1978) 8

Wainwright v. Sykes, 433 U. S. 72, 53 L. Ed. 2d 594,
97 S. Ct. 2497 (1977) 27

Withrow v. Williams, 507 U. S. 680, 123 L. Ed. 2d 407,
113 S. Ct. 1745 (1993) 10

United States Constitution

U. S. Const., Art. I, § 9, cl. 2 27

United States Statutes

21 U. S. C. § 848(q)(4)(B) 20

28 U. S. C. § 1254 10

28 U. S. C. § 2244 (1964 ed.) 11

28 U. S. C. § 2244(b) 9, 10, 13, 14, 20, 22, 25, 30

28 U. S. C. § 2244(d) 2, 9, 20, 23

28 U. S. C. § 2253 10

42 U. S. C. § 1983 ..... 14, 15

Judiciary Act of 1789, § 14, 1 Stat. 73 28

Pub. L. 94-426 § 1, 90 Stat. 1334 (1976) 5

Pub. L. 109-3 8

Rules of Court

Fed. Rule App. Proc. 35 10

Fed. Rule Civ. Proc. 60 ..... passim

Fed. Rule Civ. Proc. 81(a)(2) 7, 9

Fla. Rule Crim. Proc. 3.850 2

Rules Governing Section 2254 Cases in the United States District Courts, Rule 9(b) 23

Rules Governing Section 2254 Cases in the United States District Courts, Rule 11 ..... 5, 9

Treatises

16 J. Moore, et al., Moore's Federal Practice (3d ed. 2000) 19, 20, 21, 22

11 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure (2d ed. 1995) 8

Miscellaneous

Advisory Committee's Notes on Rules Governing Section 2254 Cases in the United States District Courts, Rule 11, 28 U. S. C., p. 479 (2000 ed.) 5

Y. Berra, quoted in J. Bartlett, Familiar Quotations (15th ed. 1980) 30

141 Cong. Rec. 15,062, col. 2 (1995) 13

H. R. Rep. No. 1892, 89th Cong., 2d Sess. (1966) 12

S. Rep. No. 1559, 80th Cong., 2d Sess. (1948) 11

S. Rep. No. 1797, 89th Cong., 2d Sess. (1966) 12

Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888 (1998) 10, 28, 29

Statement of Gov. Rick Perry on U. S. Supreme Court Ruling on Death Penalty (March 1, 2005), http://www.governor.state.tx.us/divisions/press/pressreleases/PressRelease.2005-03-01.3948 26

IN THE

Supreme Court of the United States

AURELIO O. GONZALEZ,

Petitioner,

vs.

JAMES V. CROSBY, JR.,
Secretary, Florida Department of Corrections,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

This case involves an attempt to evade Congress's landmark reform of habeas corpus law in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). This law, if properly implemented, will greatly reduce unnecessary delay in the

---

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

Both parties have given written consent to the filing of this brief.

enforcement of capital punishment and reduce the number of correct criminal judgments erroneously overturned on federal habeas corpus. These changes would advance the rights of victims and society which CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

In 1982, petitioner Aurelio Gonzalez pleaded guilty to multiple felonies: three counts of robbery with a firearm, one of armed burglary, and one of armed kidnapping. Brief in Opp. 2. For these crimes, he was sentenced to 99 years in prison. He did not appeal, but many years later filed a postconviction relief motion, denied on September 14, 1994. See *ibid.* Florida has a two-year time limitation, with exceptions, and a limit on successive motions. See Fla. Rule Crim. Proc. 3.850(b), (f). Gonzalez filed a successive motion in November 1996, claiming newly discovered evidence regarding the validity of his guilty plea. This motion was denied. Brief for Petitioner 2. The state appellate court affirmed, and it denied rehearing on May 8, 1997. See *ibid.*

Petitioner filed his federal habeas petition in June 1997. See Brief for Petitioner 3 (June 17); Brief in Opp. 3 (June 23). The precise date is not material. See Brief in Opp. 3, n. 3. The state asserted both procedural default and statute of limitations, 28 U. S. C. § 2244(d), and the District Court dismissed on statute of limitations on Sept. 9, 1998. Brief in Opp. 3. A certificate of appealability (COA) was eventually denied and the appeal dismissed on April 6, 2000.

Five months later, this Court decided *Artuz* v. *Bennett*, 531 U. S. 4 (2000), which clarified some aspects of the tolling provision of § 2244(d)(2). *Bennett* did not, however, directly address whether a time-barred state petition is "properly filed" so as to toll the federal statute, an issue presently before this Court in *Pace* v. *DiGuglielmo*, No. 03-9627. The parties in this case continue to dispute whether the original dismissal was correct. See Brief in Opp. 4.

On July 30, 2001, almost three years after the original District Court decision, petitioner filed a motion under Rule 60(b) of the Federal Rules of Civil Procedure based on an intervening change in the law. See Brief for Petitioner 4. The District Court denied it, evidently regarding the Court of Appeals' action on the appeal as conclusive. See *ibid.* A COA was granted but then vacated by a panel of the Court of Appeals. *Gonzalez* v. *Secretary for the Dept. of Corrections*, 317 F. 3d 1308, 1314 (CA11 2003). The panel quashed the original COA because it improperly addressed the original decision rather than the Rule 60(b) motion. *Id.*, at 1312. The panel declined to issue a new COA on that motion on the alternative grounds that (1) the successive petition rule applied, *ibid.*, and (2) even if it did not, Gonzalez clearly did not meet the "extraordinary circumstances" test for Rule 60(b)(6). *Id.*, at 1312-1313.

The Court of Appeals granted rehearing en banc, granted a COA, and affirmed the denial of the Rule 60(b) motion. *Gonzalez* v. *Crosby*, 366 F. 3d 1253, 1286 (CA11 2004). This Court granted certiorari on January 14, 2005, limited to the Rule 60(b) question.

SUMMARY OF ARGUMENT

The Federal Rules of Civil Procedure do not apply to habeas corpus when their application would be contrary to the statutes or rules specifically governing habeas, or when they are unsuited to the specialized needs of this unique procedure. In particular, Rule 60(b) cannot be used to evade the successive petition rule. Congress has decided when a second round of habeas litigation may be commenced and has established special procedural safeguards for quickly determining which cases qualify for a second round. The purpose of this reform is not to reduce the number of petitions *granted* on a second round, which was never the problem, but to *preclude* the second

round and its delay altogether. Broad consideration of Rule 60(b) motions would defeat the purpose of the statute.

Rule 60(b) does not apply to habeas corpus in any circumstance where it defeats the state's legitimate expectation of finality that AEDPA was enacted to protect. This includes nearly all uses of Rule 60(b) to reopen the habeas case after the normal termination of appellate review.

In the present case, use of Rule 60(b) to reopen the case over a year after the normal termination would have been contrary to the spirit of the habeas statutes, and the motion was properly denied.

ARGUMENT

I. The Federal Rules of Civil Procedure do not automatically apply to habeas cases.

The principal dissent in the Court of Appeals in this case illustrates perfectly how so many opinions on the present question start off on the wrong path and never return to the correct one. The opinion begins, "Federal Rule of Civil Procedure 60(b) authorizes the district courts to relieve a party *to a civil action* from the force of a final judgment on the following grounds . . . ." *Gonzalez* v. *Crosby*, 366 F. 3d 1253, 1287 (CA11 2004) (en banc) (Tjoflat, J., dissenting) (emphasis added). The question nearly screams off the page: yes, but what about *habeas* actions? The dissent never addresses this question. Judge Tjoflat proceeds to a detailed forensic examination of each tree, without ever checking to see if he is in the right forest.

Judge Edmonson's brief dissent similarly misses the threshold question. He approaches the question as one of reconciling an earlier and later statute which both apply to the subject, without ever pausing to ask *if* the earlier one applies. See *id.*, at 1286-1287. The principle of "giv[ing] both of the laws Congress has approved their fullest possible force," *id.*, at

1286, is simply inapplicable when one of those laws does not, by its own force, apply to the subject at hand. See *Rancho Palos Verdes* v. *Abrams*, 544 U. S. __ (No. 03-1601, Mar. 22, 2005) (slip op., at 6, n. 2) (canon against implied repeal inapplicable to question of whether newly created right with its own remedy is also enforceable through older, more general remedy).

Although habeas corpus is nominally a civil proceeding, that label is "gross and inexact." *Harris* v. *Nelson*, 394 U. S. 286, 293-294 (1969). "Essentially, the proceeding is unique." *Id.*, at 294. As originally promulgated, the Federal Rules of Civil Procedure ("Civil Rules") had "very limited application to habeas corpus proceedings." *Id.*, at 295. Civil Rule 81(a)(2) simply continued the application of civil rules to habeas proceedings to the extent they had been applied before the promulgation of the rules, but not further. *Id.*, at 294. To the extent the Civil Rules introduced procedural innovations, such as broad discovery, they did not apply to habeas. See *id.*, at 295. The *Harris* Court also noted "the unsuitability of applying to habeas corpus provisions which were drafted without reference to its peculiar problems." *Id.*, at 296. Discovery as it exists in federal civil litigation was unsuited, because it would "do violence to the efficient and effective administration of the Great Writ." *Id.*, at 297.

Unlike the principle that governs when earlier and later statutes both apply to the same case, no direct conflict with habeas statutes or rules is needed to render a Civil Rule inapplicable to habeas. *Harris* did not find that the civil discovery rules were in direct conflict with anything in the habeas statutes. It was enough that "their specific provisions are ill-suited to the special problems and characteristics of such proceedings." Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts ("Habeas Rules") was enacted seven years later, see Pub. L. 94-426 § 1, 90 Stat. 1334 (1976), and it was "intended to conform with the Supreme Court's approach in the *Harris* case." Advisory Committee's

Notes on Habeas Rule 11, 28 U. S. C., p. 479 (2000 ed.). Any proper analysis of whether a Civil Rule applies to habeas through Habeas Rule 11 must therefore consider the principles of *Harris* and its progeny. Yet petitioner's brief treatment of the subject does not, see Brief for Petitioner 10-11, the dissents in the Court of Appeals in this case do not, the Sixth Circuit's en banc opinion in *In re Abdur'Rahman*, 392 F. 3d 174 (2004) does not, and the other circuit cases collected by petitioner do not. See Brief for Petitioner 10-11, n. 7. Circuit cases which simply ignore the principles established by this Court for determining whether and how to apply a Civil Rule to habeas corpus have little, if any, persuasive value.

Petitioner claims *Browder* v. *Director, Dept. of Corrections of Ill.*, 434 U. S. 257, 263, n. 8 (1978) "assume[s] that rule 60(b) applies in habeas corpus cases," Brief for Petitioner 10, but in fact that footnote simply says that the Court was not deciding any Rule 60 question, because the party who might have made a Rule 60 motion disclaimed any reliance on that rule. Petitioner stands on firmer ground with his contention that the concurring opinion assumed Rule 60(b) applies to habeas, see *Browder*, *supra*, at 272-274 (Blackmun, J., concurring), but a concurring opinion is not a precedent even for its holdings, much less its assumptions.

Browder is really about whether Civil Rules 52(b) and 59 apply to habeas corpus, see 434 U. S., at 265, and its methodology for answering that question reinforces *Harris*. The issue was whether the 10-day limit on motions for a new trial or to amend the judgment applied. See *id.*, at 261, and n. 5. The *Browder* Court held they did, not because as Civil Rules they necessarily applied, but rather because they were consistent with and suited to the policies behind habeas procedure.

> "Rule 59 in particular is based on an 'interest in *speedy disposition* and *finality*.' [Citation.] Although some aspects of the Federal Rules of Civil Procedure may be inappropriate for habeas proceedings, see *Harris* v. *Nelson*, *supra*; *Preiser* [v. *Rodriguez*, 411 U. S. 475 (1973)], at 495-496, the requirement of a *prompt* motion for reconsideration is well suited to the 'special problems and character of such proceedings.' *Harris* v. *Nelson*, *supra*, at 296. Application of the *strict time limits* of Rules 52(b) and 59 to motions for reconsideration of rulings on habeas corpus petitions, then, is thoroughly consistent with the *spirit* of the habeas corpus statutes." *Id.*, at 271 (emphasis added).

Harris was applied specifically to Rule 60(b) in *Pitchess* v. *Davis*, 421 U. S. 482 (1975) (*per curiam*). A habeas petitioner successfully obtained a new trial, but then sought to preclude a retrial. He used Rule 60(b) to ask the Federal District Court to change its judgment from a conditional to an unconditional writ. *Id.*, at 484-485. Under the circumstances, the basis of this claim could not be exhausted in state court until the post-trial appeal. See *id.*, at 488. The Court held that Rule 60(b) could not be used to evade the exhaustion rule. Civil Rule 81(a)(2) precluded use of the Civil Rules in a manner contrary to the habeas statutes. "Since the exhaustion requirement is statutorily codified, even if Rule 60(b) could be read to apply to this situation it could not alter the statutory command." *Id.*, at 489. Because there was a direct conflict with the statute on the facts of the case, there was no need in *Pitchess* to address the more general question of whether and when application of Rule 60 would be "consistent with the spirit of the habeas statutes."

The absence of a direct conflict with the habeas rules and statutes is a necessary condition to apply a Civil Rule to habeas, but it is not sufficient. The rule in question must be consistent with the purposes and policies of those rules and statutes in a more general sense as well.

II. FRCP 60(b) does not apply to habeas cases where its effect is to evade the successive petition statute.

A. Civil Rule 60.

Rule 60 "attempts to strike a proper balance between the conflicting principles that litigation must be brought to an end

and that justice should be done." 11 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2851, p. 227 (2d ed. 1995) (cited below as "Wright & Miller"). Rule 60 was drafted with civil litigation in mind and therefore strikes that balance in the way thought appropriate for civil litigation. Criminal cases also raise the problem of balance between finality and error correction. The factors to be considered differ, however, and so a different rule addressing those concerns has evolved for habeas corpus. That different rule is the successive petition rule.

Taken as a whole, criminal procedure tilts the finality/justice balance sharply in the defendant's favor. For the criminal defendant, exclusively among all litigants, a favorable jury verdict is absolutely final and unreviewable. No matter how clearly erroneous, an acquittal cannot be overturned. See, *e.g.*, *United States* v. *Scott*, 437 U. S. 82, 91 (1978). Criminal defendants alone, of all litigants, can have the lower federal courts review claims that state courts have erred on federal questions. The prosecution cannot, and civil litigants cannot.[2] See, *e.g.*, *Atlantic Coast Line R. Co.* v. *Locomotive Engineers*, 398 U. S. 281, 286 (1970). Even when that review is concluded, res judicata as such does not apply to the denial of habeas relief. See *infra*, at 11.

The claim that unsuccessful habeas petitioners should be afforded relief from judgment on the same basis as civil litigants must be evaluated in this context. The entire proceeding is an additional layer of review that no other litigant receives, and the judgment from which relief is sought is not res judicata.

The direct effect of a judgment denying habeas relief is merely to leave the status quo intact. There is nothing to relieve. The prisoner remains in prison under the original

2. On March 21, 2005, Congress made an extraordinary exception for one specific case, Pub. L. 109-3, but the foregoing statement remains true for all others.

judgment of conviction, not the judgment denying habeas. The need for relief only arises from the indirect effects. A second petition is subject to the limits of 28 U. S. C. § 2244(b). In addition, because the statute of limitations is not tolled during the pendency of the first federal petition, see *Duncan* v. *Walker*, 533 U. S. 167, 181-182 (2001), the second petition might be time-barred. Congress has considered those possibilities and made its decision as to the appropriate balance. Exceptions for newly discovered facts, see 28 U. S. C. §§ 2244(b)(2)(B)(i), (d)(1)(D), retroactive new rules, see §§ 2244(b)(2)(A), (d)(1)(C), state-created impediments, see § 2244(d)(1)(B), and actual innocence, see § 2244(b)(2)(B)(ii), are built into the statute where and to the extent Congress thought them appropriate.

In the *Thompson* case, both this Court and the Ninth Circuit noted possible extreme cases where the state would have no legitimate expectation of finality. A party who procured a judgment by fraud upon the court would not have a legitimate judgment, *Calderon* v. *Thompson*, 523 U. S. 538, 557 (1998), and hence no entitlement to the finality of the judgment. Where the petitioner cannot meet the exceptions to the statutory rule because the state's misconduct prevents him from doing so, that misconduct could conceivably estop the state from asserting the bar. See *Thompson* v. *Calderon*, 151 F. 3d 918, 921, n. 3 (CA9 1998). Such rare circumstances can be addressed when and if they arise. The present case is a routine request to relitigate based on new legal authority. Nothing in petitioner's Rule 60(b) argument would confine use of the rule to any narrow subset of habeas cases. To hold that Rule 60(b) is generally applicable to the large class of cases where at least one claim was denied on the basis of default or statute of limitations would be to create a second, broad set of exceptions in addition to the narrow ones Congress decided upon when the issue was squarely before it. That is precisely what *Harris*, *Pitchess*, Civil Rule 81(a)(2), and Habeas Rule 11 forbid.

B. The Successive Petition Rule.

The rule on consideration of a second petition after denial of the first has evolved from unlimited allowance at common law to prohibition with only narrow exceptions under 28 U. S. C. § 2244(b). This evolution has been a response to other changes in the law of habeas corpus.

At common law, the denial of habeas relief had no preclusive effect at all, and the petitioner could apply to a different judge for *de novo* reconsideration. See *McCleskey* v. *Zant*, 499 U. S. 467, 479 (1991). This rule was needed because there was no appellate review of the denial. See *ibid.* The rule was not a burden because of the extremely narrow scope of issues which could be considered on habeas. "As applied to criminal cases, habeas corpus was a pretrial remedy. . . . After conviction, the writ was not available to attack judgments of courts of competent jurisdiction." Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 928 (1998) (footnotes omitted). The rule that denial of habeas was not res judicata presented no threat whatever to the finality of convictions, because the judgment of conviction itself *was* res judicata. See *id.*, at 930; *Ex parte Watkins*, 3 Pet. (28 U. S.) 193, 203, 209 (1830).

Both the unreviewability of habeas decisions and the narrow scope of habeas issues are long gone, and the wide-open allowance of successive petitions is gone with them. Denial of federal habeas relief is reviewable by appeal to the Court of Appeals, 28 U. S. C. § 2253, rehearing en banc in that court, Fed. Rule App. Proc. 35, and certiorari in this Court. See 28 U. S. C. § 1254. The scope of issues now includes almost all constitutional questions, the only exception being the Fourth Amendment exclusionary rule. See, *e.g.*, *Withrow* v. *Williams*, 507 U. S. 680 (1993) (declining to extend rule of *Stone* v. *Powell*, 428 U. S. 465 (1976) to *Miranda* claim). Constitutional claims, furthermore, have been vastly expanded beyond the basic requirements of fundamental fairness. See *Rose* v. *Lundy*, 455 U. S. 509, 543-544 (1982) (Stevens, J., dissenting).

In capital cases, enormous amounts of time and money go into litigating alleged noncompliance with a complex and constantly changing web of rules governing the discretionary sentencing decision, rules having nothing whatever to do with guilt or eligibility for the death sentence. There is no limit to the number of such challenges creative lawyers could bring if allowed to do so, and hence without a successive petition rule capital sentences could never be carried out.

From the early twentieth century through the Antiterrorism and Effective Death Penalty Act of 1996, the law of habeas corpus evolved in the direction of greater finality, although not without " 'some backing and filling.' " Cf. *Teague* v. *Lane*, 489 U. S. 288, 308 (1989) (plurality opinion) (quoting *Fay* v. *Noia*, 372 U. S. 391, 411-412 (1963)). *Salinger* v. *Loisel*, 265 U. S. 224 (1924) was the first recognition of the successive petition rule in this Court. While rejecting the government's argument that a prior denial was res judicata, see *id.*, at 230, the Court held, "Among the matters which may be considered, and even given controlling weight, are . . . (b) a prior refusal to discharge on a like application." *Id.*, at 231. This was a very broad discretionary rule with-no firm criteria for application. The Court indicated it would have affirmed if the District Court had denied relief on this basis, but it proceeded to the merits because the District Court had done so. *Id.*, at 232. Either resolution was proper.

When Congress enacted a new judiciary code, it included § 2244 on finality of determination. The original section was the same as the present subdivision (a), except that it applied to both state and federal prisoners. See 28 U. S. C. § 2244 (1964 ed.). In keeping with *Salinger*, the rule was discretionary. See S. Rep. No. 1559, 80th Cong., 2d Sess., 9 (1948).

Sanders v. *United States*, 373 U. S. 1 (1963) was the final chapter of "a trilogy of 'guideline' decisions" on habeas corpus. *Id.*, at 23 (Harlan, J., dissenting). "The over-all effect of this trilogy . . . [was] to relegate to a back seat . . . the principle that there must be some end to litigation." *Ibid.* *Sanders* sharply

limited the *Salinger* rule regarding successive applications. See *id.*, at 15.

Congress soon acted to reduce successive petitions. The problem was not the number of cases in which relief was being granted but rather the burdens of the litigation. See H. R. Rep. No. 1892, 89th Cong., 2d Sess., 5 (1966); S. Rep. No. 1797, 89th Cong., 2d Sess., 2 (1966). In addition, Congress found "disconcerting . . . the delays in executing State court sentences in capital cases as a result of habeas corpus applications seeking review of State court action . . . ." H. R. Rep. No. 1892, *supra*, at 5. Various proposals were considered to deal with this problem. See *id.*, at 5-6. One that survived in the final bill was "to add to section 2244 . . . provisions for a qualified application of res judicata." *Id.*, at 8. Subdivision (b) was added to provide that "after an evidentiary hearing on the merits of a factual issue, or after a hearing on the merits of an issue of law . . . a subsequent application . . . need not be entertained" unless based on a new ground which was not deliberately withheld or otherwise abusive.

Despite the clear intent of Congress to change the law in the direction of greater finality, see S. Rep. No. 1797, *supra*, at 2, it was another 20 years before this Court reexamined *Sanders*. In *Kuhlmann* v. *Wilson*, 477 U. S. 436 (1986), a plurality adopted Judge Friendly's "colorable claim of innocence" requirement for successive petitions. *Id.*, at 454. "A 'successive petition' raises grounds identical to those raised and rejected on the merits on a prior petition." *Id.*, at 444, n. 6. Five years later, *McCleskey* v. *Zant* reexamined the abuse-of-the-writ aspect of *Sanders* and adopted the cause-and-prejudice test for second petitions with claims omitted from the first. See 499 U. S., at 490.

In 1996, Congress decided that *Kuhlmann* and *McCleskey* had not gone far enough in restricting repeated rounds of habeas litigation. Just as in 1966, the concern was not with excessive grants of relief, but rather with the burden and especially the delay from the multiple rounds of litigation. In

one notorious case, the *McCleskey* rule had not been clear enough to prevent the issuance of a stay of execution to entertain a *fifth* federal challenge to a death sentence on an obviously defaulted claim. See *Gomez* v. *United States Dist. Court for the Northern Dist. of Cal.* (*Harris*), 503 U. S. 653, 653-654 (1992) (*per curiam*). Senator Hatch also cited the *Andrews* case, which took 18 years and 30 appeals. See 141 Cong. Rec. 15,062, col. 2 (1995). That case took almost three years on the second round of federal habeas. See *Andrews* v. *Deland*, 943 F. 2d 1162, 1168 (CA10 1991) (petition filed July 19, 1989), cert. denied, 502 U. S. 1110 (1992), rehearing denied, 503 U. S. 967 (March 30, 1992). This was in a case involving "no question of Andrews' participation in the crimes," 943 F. 2d, at 1186, an almost unbelievably horrific case of sadistic torture and multiple murder. See *State* v. *Pierre*, 572 P. 2d 1338, 1343-1344 (Utah 1977).

To preclude more than one round of federal review in all but the rarest cases, Congress clamped down hard on "second or successive" habeas corpus applications in its revision of § 2244(b). See *Tyler* v. *Cain*, 533 U. S. 656, 661-662 (2001). Subdivision (1) forbids without exception claims "presented in a prior application," *i.e.*, what has traditionally been called a "successive" petition. Subdivision (2) applies to claims "not presented in a prior application," *i.e.*, the "abuse of the writ" scenario. Only two narrow exceptions are allowed: (1) retroactive new rules; and (2) newly discovered facts *and* actual innocence. The references to the "merits" in former subdivision (b) are not present in the new subdivision.

Congress's intent to *preclude* the second round of litigation, not merely to enable the state to *prevail* in that round, is further implemented by the extraordinary procedural measures in subdivision (b)(3). Subdivision (b)(3)(A) requires leave of the Court of Appeals to even file the petition, and subdivision (b)(3)(B) requires that decision to be made by a three-judge panel. This is to preclude shopping for a single judge to authorize filing and grant a stay. Subdivision (b)(3)(D) requires

a decision in 30 days, and (b)(3)(E) forbids rehearing or certiorari review of that decision. The clear purpose here is that, in nearly all cases, the attempt to begin a second or subsequent round of federal review will be over in 30 days. In most capital cases, the state should be able to set an execution date the month following final disposition of the first federal habeas petition.

The intent of Congress would be subverted if the limits on successive habeas petitions could be circumvented merely by invoking a different procedural device. Twice this Court has rebuffed such attempts. In *Gomez*, the habeas petitioner withheld his challenge to the use of cyanide gas until the eve of execution and then filed the claim as a civil rights action under 42 U. S. C. § 1983. See 503 U. S., at 653. "This action is an obvious attempt to avoid the application of *McCleskey* v. *Zant*, 499 U. S. 467 (1991) to bar this successive claim for relief." *Ibid.* The Court held that Harris had made no showing of cause, *ibid.*, impliedly holding that the *McCleskey* standard applied.

Calderon v. *Thompson*, *supra*, is similar. "Thompson filed a motion with the Court of Appeals to recall its mandate denying habeas relief." 523 U. S., at 546. He also filed a Rule 60(b) motion in the District Court. See *id.*, at 547. An en banc panel of the Court of Appeals recalled the mandate. It "asserted it did not recall the mandate on the basis of Thompson's later motion for recall, but did so *sua sponte* on the basis of the claims and evidence presented in Thompson's first federal habeas petition." *Id.*, at 548.

Regarding recalls of habeas mandates in response to a petitioner's motion, the *Thompson* Court said,

> "In a § 2254 case, a prisoner's motion to recall the mandate on the basis of the merits of the underlying decision can be regarded as a second or successive application for purposes of § 2244(b). Otherwise, petitioners could evade the bar against relitigation of claims presented in a prior application, § 2244(b)(1), or the bar against litigation of claims not presented in a prior application, § 2244(b)(2). *If the court grants such a motion, its action is subject to AEDPA* irrespective of whether the motion is based on old claims (in which case § 2244(b)(1) would apply) or new ones (in which case § 2244(b)(2) would apply)." *Id.*, at 553 (emphasis added).

This statement is *dictum*, since the Court went on to hold that the *sua sponte* recall on the original petition was not subject to § 2244(b). See *id.*, at 554. Even so, it is an important statement of principle, and one on which the Court appeared to be unanimous. See *id.*, at 569, n. 1 (Souter, J., dissenting).

Gomez and *Thompson* are applications of the more general principle that when Congress has provided a specific procedure for the resolution of particular controversies and placed limitations on it, those limitations cannot be evaded simply by choosing a different and more general procedure. Even though a challenge to the fact or duration of custody by state officers may fall within the broad language of the civil rights remedy statute, 42 U. S. C. § 1983, it cannot be used in lieu of habeas for such a challenge. See *Spencer* v. *Kemna*, 523 U. S. 1, 20 (1998) (Souter, J., concurring). Despite the broad wording of the All Writs Act, it cannot be used when another "statute specifically addresses the particular issue at hand . . . ." *Pennsylvania Bureau of Correction* v. *United States Marshals Service*, 474 U. S. 34, 43 (1985).

The successive petition rule is a "modified res judicata rule," well within the power of Congress to enact. See *Felker* v. *Turpin*, 518 U. S. 651, 664 (1996). Courts can weigh the competing interests of habeas petitioners and the state in the absence of a statute or in construing a vague statute, as this Court did in *Sanders*, *Kuhlmann*, and *McCleskey*, see *Lonchar* v. *Thomas*, 517 U. S. 314, 323 (1996), but the balance struck judicially is always subject to legislative revision. Congress has deliberately moved the mark, and the wisdom of its choice

is not for courts to decide. See *id.*, at 328. Neither is the statute a mere inconvenience to be evaded.

Congress meant to give habeas petitioners one round of federal review, *i.e.*, decision by the district court, appeal to the court of appeals, and certiorari to this Court. The end of that first round was meant to be the end in all but the rarest cases, with a highly expedited process for determining whether a case was one of the rare ones. A holding that Rule 60(b) is generally available would destroy this system. Even if nearly all Rule 60(b) motions are denied, unless they are subject to the requirements of § 2244(b) the litigation of them will become the second round of review that Congress meant to prevent.

III. The state's legitimate interest in finality of the judgment is the starting point for determining when use of Rule 60(b) is contrary to the spirit of AEDPA.

A. Finality and AEDPA.

In his dissent in *Abdur'Rahman* v. *Bell*, 537 U. S. 88 (2002), Justice Stevens endorsed the approach of Judge Tjoflat, drawing the line between Rule 60(b) motions that challenge the integrity of the habeas proceeding itself and those that assert new or newly bolstered attacks on the underlying criminal judgment. See *id.*, at 94-96 (quoting *Mobley* v. *Head*, 306 F. 3d 1096, 1100-1105 (CA11 2002) (dissenting opinion)). Judge Tjoflat proffers the same distinction in the present case, designating the former type a "true Rule 60(b) motion." *Gonzalez* v. *Crosby*, 366 F. 3d 1253, 1292 (CA11 2004) (dissenting opinion).

This proposal would draw the line at a point which is utterly irrelevant to the purpose Congress had in mind when it enacted AEDPA. The overarching theme of AEDPA is to enhance the finality of criminal judgments. Congress was deeply dissatisfied with the way federal courts had entertained one proceeding after another, and it resolved to limit habeas petitioners to "one bite of the apple." See Brief for Criminal Justice Legal

Foundation as *Amicus Curiae* in *Bell* v. *Thompson*, No. 04-514, pp. 10-13 ("CJLF *Thompson* Brief"), http://www.cjlf.org/briefs/ThompG.pdf.

Nothing in the language or purpose of AEDPA limits its enhanced finality to cases where the federal court reaches the petitioner's underlying claim, as opposed to those decisions based on procedural default or the statute of limitations. Just the opposite, Congress repealed references to "the merits" in the earlier statute. See *supra*, at 13. The successive petition limit is "a modified res judicata rule," *Felker* v. *Turpin*, 518 U. S. 651, 664 (1996), and res judicata applies just as much to a decision that a claim is permanently barred as it does to a decision that a claim was meritless from the beginning. See *Angel* v. *Bullington*, 330 U. S. 183, 190 (1947); see also *Plaut* v. *Spendthrift Farm, Inc.*, 514 U. S. 211 (1995) (dismissal on statute of limitations was res judicata, cannot be reopened even when Congress directed reopening). Cases involving decisions that federal relief cannot be granted *yet*, as opposed to decisions that federal relief cannot be granted *at all*, are inapposite. Cf. *Slack* v. *McDaniel*, 529 U. S. 473, 487 (2000) (unexhausted); *Stewart* v. *Martinez-Villareal*, 523 U. S. 637, 644-645 (1998) (premature).

Under Judge Tjoflat's proposed separation, decisions on procedural grounds would never be truly final. The travesty of the Robert Alton Harris execution that Congress specifically sought to ensure would never happen again, see *supra*, at 13; CJLF *Thompson* Brief 10-11, could happen again. Among claims that might be considered "seeking relief from the federal court's final order entered in a habeas proceeding," *Abdur'Rahman*, 537 U. S., at 94 (dissent), include claims that the court erred in deciding it could not reach the underlying claim because of (1) the statute of limitations, (2) procedural default, (3) failure to develop facts in state court, or (4) nonretroactivity of the claimed rule of law. In other words, use of virtually any of the tools that Congress and this Court have provided to limit second-guessing of the state court by the federal court would

transform a judgment in the state's favor into a mere tentative ruling, reopenable at any time on a Rule 60(b) motion. While the First Circuit expresses confidence that "the district courts will be able to sift wheat from chaff without undue difficulty," *Rodwell* v. *Pepe*, 324 F. 3d 66, 71 (2003), Congress does not share this confidence. It enacted AEDPA precisely because it was exasperated with the federal courts' insufficient respect for the need for finality in criminal judgments.

Amicus Abdur'Rahman contends that Rule 60(b) motions are only filed in a "miniscule fraction" of all habeas cases. See Brief for Abu-Ali Abdur'Rahman as *Amicus Curiae* 4-5 ("Abdur'Rahman Brief"). However, the methodology of this survey does not capture all 60(b) motions, see *id.*, at 5, n. 6, and probably misses most of them. More importantly, the survey does not separate the cases Congress was most interested in—capital cases—from the others. In capital cases, 60(b) motions are not rare. In *Amicus* CJLF's survey of executed capital judgments in the Ninth Circuit, there were three such motions denied by the District Court and appealed to the Court of Appeals out of nineteen cases, nearly one-sixth of the total. When combined with motions to recall the mandate (or to further stay it and reconsider after this Court's denial of certiorari) plus civil rights actions, there was some substantial attempt to evade Congress's successive petition limit in nearly every case. See CJLF *Thompson* Brief, Appendix A.

Amicus Abdur'Rahman also quibbles between attacking the finality of the underlying conviction and attacking the finality of the habeas judgment. *Abdur'Rahman* Brief 4, n. 5. Any ongoing proceeding that forces the state to marshal its resources to protect its judgment, see *Teague* v. *Lane*, 489 U. S. 288, 310 (1989), is an attack on the finality of the judgment. In capital cases, any ongoing proceeding that lengthens the stay of execution, delaying and denying justice, is an attack on the finality of the judgment. Abdur'Rahman's distinction has no difference.

B. Applying Harris to Rule 60(b).

Harris v. *Nelson*, 394 U. S. 286, 298 (1969), held that, even though the discovery provisions of the Civil Rules did not directly apply to habeas corpus, courts could nonetheless order discovery adopting such procedures as are suited to habeas. Habeas Rule 6 subsequently codified the specific holding of *Harris* for discovery, while Habeas Rule 11 codified its general approach to adoption of Civil Rules.

The same approach is in order for Civil Rule 60. Looking at how that rule is applied in civil cases, is each application consistent with the goal of Congress to enhance the finality of criminal proceedings? The simplest case is presented by Rule 60(a), correction of clerical mistakes. "The State can have little interest . . . in preserving a [judgment] not in accordance with the actual decision rendered by the court." *Calderon* v. *Thompson*, 523 U. S. 538, 557 (1998). Rule 60(b) presents the more difficult questions.

Preliminarily, two overall requirements of Rule 60(b) are worth noting. First, the movant must show an arguably meritorious claim. See 16 J. Moore, et al., Moore's Federal Practice § 60.24, pp. 60-77 to 60-79 (3d ed. 2000); cf. *Slack* v. *McDaniel*, 529 U. S. 473, 478 (2000) (COA on procedural point requires at least debatable merit on both procedural claim of error and underlying constitutional claim). Second, all six clauses of Rule 60(b) require a motion within a reasonable time, and the first three have an additional, strict, one-year cut-off. See Moore's, *supra*, § 60.65, at 60-198 to 60-203.

1. Mistake, inadvertence, surprise, and excusable neglect.

An entry of judgment against a *pro se* prisoner who is unable to respond due to the circumstances of his incarceration is an example of a situation warranting relief under this clause. See *id.*, § 60.41[1][b], at 60-87 to 60-88. As applied to habeas, this would typically happen when the respondent is at least partly at fault, and the one-year limit prevents indefinite delay

of true finality. The situation will not arise in capital cases, where § 2254 petitioners always have the right to counsel. See 21 U. S. C. § 848(q)(4)(B). Errors of counsel are generally not cognizable under this clause, see Moore's, *supra*, § 60.41[2], at 60-95 to 60-96, and entertaining a Rule 60(b) motion on grounds of ineffective assistance of habeas counsel would circumvent the rule of *Coleman* v. *Thompson*, 501 U. S. 722, 753-754 (1991).

The circuits are divided on whether a mistake of law by the district court is a ground for relief under Rule 60(b)(1), and those that do allow it generally construe "reasonable time" to mean within the time to appeal. See Moore's, *supra*, § 60.41[41], at 60-99 to 60-113. Allowing the district court to correct a patent error *before* appeal that would surely be grounds for reversal *on* appeal makes good sense in terms of efficiency. See *id.*, at 60-106. Once the appeal is under way, the appeal itself is the efficient and proper way to correct a legal error. Once the appeal is over, the intent of Congress to create "a modified res judicata rule," see *supra*, at 15, forbids use of this ground to obtain an otherwise forbidden second round of litigation.

2. Newly discovered evidence.

Congress expressly considered the question of newly discovered evidence and provided when it would be grounds for a successive petition and to restart the statute of limitations clock. See 28 U. S. C. §§ 2244(b)(2)(B), (d)(1)(D). Rule 60(b)(2) cannot be used to strike the balance at a different point.

3. Fraud on the court.

If the state procures a judgment by fraud, it has no legitimate interest in the finality of its illegitimate judgment. See *Calderon* v. *Thompson*, 523 U. S., at 557.

4. Void judgment.

Rule 60(b)(4) is unnecessary in many cases, see Moore's, *supra*, § 60.44[b], at 60-140 to 60-141, and so it is for the petitioner in habeas corpus. If the first petition was denied by a court lacking jurisdiction, the second is simply not successive, and no relief from the first is required. The State, on the other hand, may need this relief. See *Rumsfeld* v. *Padilla*, 542 U. S. __, 124 S. Ct. 2711, 2715-2717, 159 L. Ed. 2d 513, 524-527 (2004) (release ordered by court lacking subject-matter jurisdiction).

5. Satisfaction, reversed prior judgment, prospective application.

The "satisfaction" prong of this clause has no application to a denial of habeas relief. There is nothing to satisfy. Reversed prior judgment could be a legitimate use for Rule 60(b)(5), or it could be unnecessary, depending on how this Court resolves *Johnson* v. *United States*, No. 03-9685.

Unjust prospective application applies only to habeas judgments *granting* relief. *Denial* of injunctive relief does not have prospective application. See Moore's, *supra*, § 60.47[1][e], at 60-160 to 60-161. On the other hand, where the custodian has been ordered to release the prisoner or give him a new trial, it would be unjust to require prospective application if new authority comes down before the trial negating the basis of the judgment. Cf. *Agostini* v. *Felton*, 521 U. S. 203, 215 (1997) (60(b)(5) relief from injunction due to change in law). For example, in *Ritter* v. *Smith*, 811 F. 2d 1398, 1400-1401 (CA11 1987), the Court of Appeals had directed that a conditional writ of habeas corpus issue, requiring a new sentencing hearing, based on a holding that the sentencing statute was unconstitutional. Before the resentencing was conducted, this Court held in another case that the statute in question was constitutional. *Ritter* held that the state was entitled to 60(b) relief, although mistakenly placing the case

under 60(b)(6). See *id.*, at 1403. As *Agostini* now makes clear, the correct clause is (b)(5).

6. Catch-all.

The difficult problem, and the great danger, is the "catch-all" provision of clause 6: "any other reason justifying relief from the operation of the judgment." What justifies relief is a value-laden judgment, and the potential for evasion of AEDPA by judges who strongly disagree with Congress's value choices is great.

This Court has already established that the broad language of Rule 60(b)(6) may not be used to evade the limits on the other clauses. See *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U. S. 847, 863, and n. 11 (1988). "Extraordinary circumstances" are required. See *id.*, at 864; *Ackermann* v. *United States*, 340 U. S. 193, 202 (1950).

The majority position is that a change in decisional law does not amount to "extraordinary circumstances" even in the civil cases to which Rule 60(b)(6) directly applies. See Moore's, *supra*, § 60.48[5], at 60-180 to 60-183; *Hess* v. *Cockrell*, 281 F. 3d 212, 216, and n. 18 (CA5 2002) (habeas case relying on civil precedents). Certainly it is not a ground for relief as applied to habeas corpus. Congress has expressly considered when such a change will be a ground for relief: new rules of constitutional law made retroactive on habeas by this Court. See 28 U. S. C. § 2244(b)(2)(A); *Tyler* v. *Cain*, 533 U. S. 656, 662 (2001). To reopen a criminal case after the normal end of one full round of habeas review based on any lesser change in case law would be to strike the balance at a different point than the one chosen by Congress.

Amicus Abdur'Rahman presents several examples of cases where application of Rule 60(b) to habeas is purportedly necessary to prevent injustice and consonant with the spirit of the habeas statutes. In some, application of Rule 60(b) is, indeed, appropriate. In others, other remedies are available and appropriate. In still others, application of Rule 60(b) is contrary

to the purpose of AEDPA, gives too little finality to the judgment, and is improper.

Abdur'Rahman's first example is himself. This case was thoroughly briefed when it was before this Court, and the argument need not be repeated here. See Brief *Amicus Curiae* for Criminal Justice Legal Foundation in *Abdur'Rahman* v. *Bell*, No. 01-9094, http://www.cjlf.org/pdf/Abdur'R.pdf. For the reasons explained in our prior brief, habeas was correctly denied in that case. Abdur'Rahman personally bound and blindfolded the victims, rendering them helpless for slaughter. See *id.*, at 2. The miscarriage of justice in Abdur'Rahman's case is the fact that the judgment remains unexecuted 19 years after the crimes.

Most of the other examples involve the Second Circuit's changing interpretation of the AEDPA statute of limitations, 28 U. S. C. § 2244(d), to pre-AEDPA cases. In *Peterson* v. *Demskie*, 107 F. 3d 92, 93 (1997), the Second Circuit indicated that in such cases the petition needed to be filed within a "reasonable time" after enactment of AEDPA on April 24, 1996, but that prisoners who had already waited several years at that point need not be given the full additional year. Then in *Ross* v. *Artuz*, 150 F. 3d 97, 102-103 (1998), the Second Circuit decided that these petitioners would have the full year, until April 23, 1997. Either interpretation is reasonable, and either one protects the diligent petitioner who files his federal petition promptly upon exhaustion of his state remedies. At least since the adoption of Habeas Rule 9(b) in 1976, prisoners have been on notice that delayed petitions might be dismissed if they prejudiced the state, and no one who waited years after exhaustion of state remedies could legitimately claim to be unfairly surprised.

Matos v. *Portuondo*, 33 F. Supp. 2d 317 (SDNY 1999) is an example of a legitimate use of Rule 60(b) to correct a mistake of law by the District Court that would surely have resulted in reversal on appeal. *Ross* came down five days after the District Court dismissed the petition under *Peterson*, and

the petitioner filed his 60(b) motion 16 days after dismissal, within the time to appeal. This is simple judicial efficiency. There was no point in going through the motions of an appeal when the result was obvious. Granting relief in this situation does not impair any legitimate expectation of finality, and it is proper under Rule 60(b)(1), not (b)(6). See *supra*, at 20.

Robles v. *Senkowski*, No. 97 Civ. 2798, 1999 U. S. Dist. LEXIS 11565 (SDNY, July 30, 1999) is an example where another remedy was available and should have been used. The appeal was already pending when *Ross* was decided, but the Court of Appeals dismissed it because petitioner had neither paid the filing fee nor moved to proceed in forma pauperis. See *id.*, at *2-*3. The available, correct procedure was to cure and reinstate the appeal, at which point the Court of Appeals would have reversed and remanded under *Ross*. See *Gaca* v. *United States*, 411 U. S. 618 (1973) (*per curiam*); *Reyes* v. *Keane*, 90 F. 3d 676, 677-678, 681 (CA2 1996) (reinstating appeal of *pro se* habeas petitioner in similar circumstances).

Liberatore v. *McGuiness*, No. 96 Civ. 6943, 1998 U. S. Dist. LEXIS 22842 (SDNY, Oct. 7, 1998), is an example where Rule 60(b)(6) was improperly used to defeat the finality of the judgment. Liberatore was convicted of violent crimes in 1987. See *id.*, at *1. He received review of his claims in a published decision of the Appellate Division. See *ibid.* (citing *People* v. *Liberatore*, 561 N. Y. S. 2d 832 (1990)). He then waited five years after exhaustion of state remedies to file a federal habeas petition. The District Court dismissed the habeas petition as untimely on September 20, 1996. See *id.*, at *2. If this dismissal was erroneous, there was a remedy by appeal, but petitioner did not appeal. See *ibid.* Sometime after *Ross*, petitioner filed his Rule 60(b) motion, which makes it well after the strict one-year cut-off for 60(b)(1). See *id.*, at *3-*4. Contrary to the District Court's decision in this case, there were no "extraordinary circumstances" justifying the drastic action of reopening a final judgment. A simple change in case law is not "extraordinary" by any definition. It happens all the time.

In civil cases, it is the nature of res judicata that a judgment once final decides the matter between the parties, even if a subsequent development in case law indicates that the decision was erroneous. Even in civil cases, Rule 60(b)(6) is not an open-ended invitation to reopen any judgment any time a precedent on which it is based is overruled. "Indeed, the common law could not safely develop if the latest evolution in doctrine became the standard for measuring previously resolved claims. The finality of judgments protects against this kind of retroactive lawmaking." See *Biggins* v. *Hazen Paper Co.*, 111 F. 3d 205, 212 (CA1 1997).

In *Liberatore*, there was no compelling need to extend the temporal reach of *Ross* to rescue a dilatory petitioner who waited years to file his federal habeas petition and did not bother to appeal its dismissal. The state had won its case at trial, successfully defended its judgment in the state courts, and successfully defended it again under the then-prevailing circuit rule on federal habeas. Congress has decided that in such circumstances further reconsideration will be strictly limited to a very small set of exceptionally compelling cases. See 28 U. S. C. § 2244(b). There are a great many cases that would be considered incorrectly decided under later case law that do not qualify for these strict criteria. Congress has decided that finality in criminal law is important enough that it outweighs the need for error correction in all but the cases specified. By deciding that a simple change in procedural law "justifies" relief under Rule 60(b)(6), the District Court substituted its value judgment for that of Congress.

Petitioner proffers the example of claims of mentally retarded inmates on death row under *Atkins* v. *Virginia*, 536 U. S. 304 (2002) as a reason why Rule 60(b)(6) motions must be allowed long after the normal end of the first habeas petition. See Brief for Petitioner 42-44. However, the "functional equivalent" approach of petitioner and the cases he relies on is neither necessary nor sufficient to address the *Atkins* cases.

Under this approach, a "true" or "proper" 60(b)(6) motion addresses a defect in the habeas process itself, as distinguished from a newly asserted or reasserted ground for attacking the state judgment. The latter is the functional equivalent of a second or successive habeas petition. See Brief for Petitioner 19-20. A petitioner claiming to be mildly retarded and claiming that this condition categorically excluded him from the death penalty would have been denied relief before *Atkins* in a perfectly correct habeas proceeding. Every district and circuit court was duty-bound to apply the not-yet-overruled Supreme Court precedent on point, *Penry* v. *Lynaugh*, 492 U. S. 302, 334 (1989). A post-*Atkins* Rule 60(b)(6) motion by such a petitioner *does* "address directly the underlying *state court* proceedings," Brief for Petitioner 19, and this is the functional equivalent of a second or successive habeas petition under petitioner's own authorities. The proposed rule is therefore not sufficient to redress the *Atkins* claims.

The proposed rule is also not necessary for these claims. There has been no state-court rebellion against *Atkins*. State courts and legislatures are fashioning procedures and hearing the claims. See, *e.g.*, *In re Hawthorne*, 35 Cal. 4th 40, 43-44, 105 P. 3d 552, 554 (2005) (allowing fourth habeas petition and transferring case for evidentiary hearing). Executive clemency is also available for any death row inmate who either was under 18 at the time of the crime or claims to be mentally retarded. See, *e.g.*, Statement of Gov. Rick Perry on U. S. Supreme Court Ruling on Death Penalty (March 1, 2005), http://www.governor.state.tx.us/divisions/press/pressreleases/PressRelease.2005-03-01.3948 (directing parole board evaluation in response to *Roper* v. *Simmons*, 543 U. S. __ (No. 03-633, Mar. 1, 2005)). If and when a retarded or juvenile murderer actually faces execution and is denied any remedy, this Court can decide whether the Constitution requires one. The remedy need not be Rule 60(b) or, for that matter, federal habeas corpus.

IV. There is no constitutional doubt in this case.

The value judgment implicit in petitioner's "constitutional doubt" argument is a belief that every state prisoner should get a federal court ruling on the merits of his underlying claim, and the courts should bend every rule to see that he gets it. That belief was the guiding light of this Court's habeas corpus jurisprudence at one time under the regime of *Fay* v. *Noia*, 372 U. S. 391 (1963), but that day is long gone. *Fay* and its approach to habeas were steadily eroded by a long series of decisions, see *e.g.*, *Wainwright* v. *Sykes*, 433 U. S. 72, 90 (1977), until it was formally overruled in *Coleman* v. *Thompson*, 501 U. S. 722, 750 (1991). *Coleman* stated expressly what had long been implied: *Fay* had underestimated the importance of finality. See *ibid.* Congress not only endorsed this revised policy determination, but it decided this Court had not gone far *enough* in the direction of finality. The successive petition rule enacted by Congress is considerably more stringent than this Court's pre-AEDPA cases, see *Calderon* v. *Thompson*, 523 U. S. 538, 558 (1998), and the new statute of limitations is more stringent that the pre-AEDPA Habeas Rule 9(b), as construed in *Lonchar* v. *Thomas*, 517 U. S. 314, 328 (1996). Petitioner's call to return to *Fay*'s imperative of deciding the merits of every underlying claim is an anachronism. Indeed, now that Congress has spoken, this Court could not return to *Fay* even if it were inclined to do so. Absent a constitutional mandate, the decision of Congress on a question of policy is final.

Apparently aware that the intent of AEDPA is against him, petitioner turns to the last refuge for interpretive lost causes: the doctrine of constitutional doubt. See *Reno* v. *Flores*, 507 U. S. 292, 314, n. 9 (1993); Brief for Petitioner 32-39. In habeas cases, this inevitably takes the form of an appeal to the Suspension Clause, U. S. Const., Art. I, § 9, cl. 2. Like the monster in a series of bad horror movies, this argument keeps coming back no matter how many times it appears to have been killed. It is high time for this Court to bury it for good.

There are two simple reasons why the Suspension Clause creates no doubt whatsoever of the constitutionality of AEDPA. First, the Suspension Clause creates no obligation for Congress to extend federal habeas to state prisoners. Second, the Suspension Clause creates no obligation to make habeas corpus available as a means of collateral attack on the criminal judgments of courts of general jurisdiction. Either is sufficient to eliminate any doubt.

On federal habeas corpus ad subjiciendum for state prisoners, the historical record is crystal clear. The First Congress flatly prohibited it. See Judiciary Act of 1789, § 14, 1 Stat. 73, 81-82. Although at least one federal court chafed at the restriction, see *Ex parte Cabrera*, 4 F. Cas. 964, 965-966 (No. 2278) (CCD Pa. 1805), no doubts were expressed as to its constitutionality. See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 932 (1998); see also *Ex parte Dorr*, 44 U. S. (3 How.) 103, 105 (1845) (following statute, no constitutional doubts raised or expressed).

On the use of habeas corpus as a collateral attack on the judgment of a court of general jurisdiction, the record is equally clear. The writ was so clearly unavailable for that purpose at the time of the Founding that it was 41 years before anyone even tried. See Scheidegger, 98 Colum. L. Rev., at 929, n. 280. When someone finally did, the attempt was definitively rejected. See *id.*, at 929-930 (discussing ***Ex parte Watkins***, 28 U. S. (3 Pet.) 193 (1830)).

In *Felker* v. *Turpin*, 518 U. S. 651, 663 (1996), this Court effectively acknowledged that the constitutional doubt argument was baseless on the original understanding of the Suspension Clause. The *Felker* Court did not resolve whether the Suspension Clause could have somehow "evolved" to make a constitutional mandate of something the founding generation flatly forbade. Instead *Felker* held that the limitation on successive petitions was consistent with even a hypothetical evolved Suspension Clause. See *id.*, at 664. That hypothetical

should be addressed and rejected in the present case. Whatever argument might be made for constitutional evolution in such vague and expansive phrases as "unreasonable search" or "cruel and unusual punishment," see, *e.g.*, *Roper* v. *Simmons*, 543 U. S.__ (No. 03-633, Mar. 1, 2005) (slip op., at 6), there is no credible argument for such amendment by interpretation here. The Suspension Clause used a legal term of art, habeas corpus, that referred to a specific procedure for a specific purpose: getting people out of jail who are held there illegally before trial or without trial. The fact that this procedure later evolved into a mode of collateral attack on final convictions is no ground for similarly expanding the constitutional mandate, nor is it any ground for mandating federal review of state convictions, when Article III clearly empowers Congress to set the jurisdictional bounds of the "inferior" courts it creates. See Scheidegger, 98 Colum. L. Rev., at 918-919.

The First Congress had the power to forbid federal habeas for state prisoners altogether. No amendment has rescinded that power. The First Congress created a writ for federal prisoners that did not include collateral attack on judgments of courts of general jurisdiction. No amendment has rescinded that power. The greater power to forbid collateral review includes the lesser power to offer it on limited terms, so long as the limitations are not based on suspect classifications or other unconstitutional discrimination. See Scheidegger, 98 Colum. L. Rev., at 953-957. There is no doubt about the constitutionality of AEDPA under *any* reasonable interpretation, and hence the doctrine of constitutional doubt has no application to this case.

V. Use of Rule 60(b) in the present case would be contrary to the spirit of AEDPA.

Applying the foregoing principles is straightforward. Petitioner's claims were reviewed and rejected by the state courts. The federal courts rejected his petition as untimely in

a decision that was a reasonable interpretation of the statute and may very well have been correct. He had his one bite at the federal-court apple, which does not necessarily include determination of the merits of the underlying claim. The state's reasonable expectation of finality attached when the Court of Appeals denied a certificate of appealability and petitioner sought no further review of that decision. Cf. *Calderon* v. *Thompson*, 523 U. S. 538, 556 (1998).

To allow the use of Rule 60(b) to reopen the habeas case based on a mere change in procedural case law would be contrary to the purpose of AEDPA to strictly limit such reopenings. Petitioner has not alleged a miscarriage of justice in the sense that he is actually innocent of the offenses for which he is in prison. Cf. *id.*, at 558; 28 U. S. C. § 2244(b)(2)(B)(ii). Absent such a claim, and credible evidence to support it, the federal habeas case should be over when it is over. Cf. Y. Berra, quoted in J. Bartlett, Familiar Quotations 903 (15th ed. 1980).

CONCLUSION

The decision of the Court of Appeals for the Eleventh Circuit should be affirmed.

April, 2005

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

Supreme Court, U.S.
FILED
FEB 2 5 2005
OFFICE OF THE CLERK

(2)

NO: 04-6432

IN THE
SUPREME COURT OF THE UNITED STATES

AURELIO O. GONZALEZ,

Petitioner,

v.

JAMES V. CROSBY, JR.
Secretary for the Department of Corrections,

Respondent.

On Writ of Certiorari
to the Court of Appeals for the Eleventh Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

JOSHUA L. DRATEL
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
14 Wall Street, 28th Floor
New York, New York 10005
(212) 732-0707

DAVID OSCAR MARKUS*
HIRSCH & MARKUS, LLP
9130 S. Dadeland Blvd., 1200
Miami, Florida 33156
(305) 670-0077

Of counsel :
M. AYA GRUBER
HOWARD M. WASSERMAN
KAREN PITA-LOOR
LILIAN APONTE-MIRANDA
PROFESSORS OF LAW,
FLORIDA INTERNATIONAL
UNIVERSITY COLLEGE OF LAW
Miami, Florida 33199
(305) 348-8345
Counsel for Amicus Curiae
*counsel of record

QUESTIONS PRESENTED BY *AMICUS CURIAE*

1. Did the Court of Appeals' interpretation of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") effect an improper implied repeal of Rule 60 of the Federal Rules of Civil Procedure?

2. Did the Court of Appeals' interpretation of AEDPA raise grave constitutional concerns?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED BY *AMICI CURIAE* i

TABLE OF AUTHORITIES iv

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. AEDPA's limitations on successive habeas applications did not Repeal Rule 60. 2

A. AEDPA did not repeal Rule 60(b) by implication because there is no irreconcilable conflict between AEDPA and Rule 60(b) 4

B. Allowing Rule 60(b) relief will not circumvent the restrictions in AEDPA and this Court has an obligation to adopt the interpretation that preserves Rule 60(b) to the greatest extent 14

(1) Rule 60(b) retains a distinct scope that does not overlap or conflict with § 2244 15

(2) The Eleventh Circuit's treatment of Rule 60(b) is not a repeal to the "minimum extent necessary" 19

C. AEDPA's limitations on successive habeas applications do not evidence congressional intent to displace a court's traditional equitable power to modify its judgments 20

II. This Court should interpret AEDPA and Rule 60(b) consistently to avoid a construction that raises grave constitutional concerns 23

A. Interpreting AEDPA as prohibiting Rule 60(b) relief raises grave concerns over unconstitutional suspension of the writ 23

B. Interpreting AEDPA as prohibiting Rule 60(b) relief raises grave concerns over denial of due process of law 27

CONCLUSION 30

TABLE OF AUTHORITIES

Cases

Abdur'Rahman v. Bell, 392 F.3d 174 (6th Cir. 2004) ..... *passim*

Abdur'Rahman v. Bell, 537 U.S. 88 (2002) ..... *passim*

Addington v. Texas, 441 U.S. 418 (1979) 28

Agostini v. Felton, 521 U.S. 203 (1997) 16

Allen v. McCurry, 449 U.S. 90 (1980) 5

Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951) 28

Arizona v. California, 460 U.S. 605 (1983) 13

Artuz v. Bennett, 531 U.S. 4 (2000) 17

Bankers Mortgage Co. v. United States, 423 F.2d 73 (5th Cir. 1970) 20

Bonin v. Vasquez, 999 F.2d 425 (9th Cir. 1993) 27

Branch v. Smith, 538 U.S. 254 (2003) 2

Browder v. Director, 434 U.S. 257 (1978) 4, 5

Calderon v. Thompson, 523 U.S. 538 (1998) .. 17, 21, 22, 29

Califano v. Yamasaki, 442 U.S. 682 (1979) 3

Callihan v. Schneider, 178 F.3d 800 (6th Cir. 1999) 3

Clark v. Suarez Martinez, 125 S. Ct. 716 (2005) 23

Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) 27

Cook County v. United States ex rel. Chandler, 538 U.S. 119 (2003) 3

Cornell v. Nix, 119 F.3d 1329 (8th Cir. 1997) 5

Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987) 3, 19

Davis v. United States, 411 U.S. 233 (1973) 4

Dretke v. Haley, 124 S. Ct. 1847 (2004) 8

Engle v. Isaac, 456 U.S. 107 (1982) 8, 26

Fay v. Noia, 372 U.S. 391 (1963) 7, 8

Felker v. Turpin, 518 U.S. 651 (1996) ..... *passim*

Ford v. Wainwright, 477 U.S. 399 (1986) 6, 26

Francis v. Henderson, 425 U.S. 536 (1976) 25, 27

Gonzalez v. Director, 366 F.3d 1253 (11th Cir. 2004) (en banc) ..... *passim*

Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004) 24

Harris v. Nelson, 394 U.S. 286 (1969) 4

Hecht Co. v. Bowles, 321 U.S. 321 (1944) 21

Hunt v. Nuth, 57 F.3d 1327 (4th Cir. 1995) 6

Johnson v. Avery, 393 U.S. 483 (1969) 24

Klapprott v. United States, 335 U.S. 601 (1949) 4

Kremer v. Chem. Constr. Corp., 456 U.S. 461 (1982) .. 5, 18

Kuhlmann v. Wilson, 477 U.S. 436 (1986) 9, 10, 13

Liljeberg v. Health Serv. Acquisition Corp., 486 U.S. 847 (1988) 11, 16

Lonchar v. Thomas, 517 U.S. 314 (1996) ..... *passim*

Matarese v. LeFevre, 801 F.2d 98 (2d Cir. 1986) 5

Mathews v. Eldridge, 424 U.S. 319 (1976) 28

McCleskey v. Zant, 499 U.S. 467 (1991) ..... *passim*

Mohammed v. Sullivan, 866 F.2d 258 (8th Cir. 1989) 5

Montana v. United States, 440 US 147 (1979) 12, 13

Mooney v. Holohan, 294 U.S. 103 (1935) 28

Morton v. Mancari, 417 U.S. 535 (1974) 3, 14

Muniz v. United States, 236 F.3d 122 (2d Cir. 2001) 13

Murray v. Carrier, 477 U.S. 478 (1986) ..... *passim*

National Archives and Records Admin. v. Favish, 124 S. Ct. 1570 (2004) 6

New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979) 23

Parklane Hosiery v. Shore, 439 U.S. 322 (1979) 12

Paterno v. Lyons, 334 U.S. 314 (1948) 28

Pitchess v. Davis, 421 U.S. 482 (1975) 5

Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995) ... 4, 20

Porter v. Warner Holding Co., 328 U.S. 395 (1946) 21

Posadas v. National City Bank of N.Y., 296 U.S. 497 (1936) 3, 14

Radzanower v. Touche Ross & Co., 426 U.S. 148 (1976) ..... *passim*

Rail Act Cases, 419 U.S. 102 (1974) ..... *passim*

Rasul v. Bush, 124 S. Ct. 2686 (2004) 24

Ritter v. Smith, 811 F.2d 1398 (11th Cir. 1987) 5

Rodriguez v. Artuz, 990 F. Supp. 275 (S.D.N.Y. 1998) 18, 25

Rodriguez v. Mitchell, 252 F.3d 191 (2d Cir. 2001) ..... *passim*

Rodriguez v. United States, 480 U.S. 522 (1987) 12

Rodwell v. Pepe, 324 F.3d 66 (1st Cir. 2003) .....*passim*

Rosa v. Senkowski, 1997 WL 436484, at 5
(S.D.N.Y. 1997) 18

Salinger v. Loisel, 265 U.S. 224 (1924) 9

Sanders v. United States, 373 U.S. 1 (1963) .....*passim*

Sawyer v. Whitley, 505 U.S. 333 (1992).....*passim*

Silver v. New York Stock Exch.,
373 U.S. 341 (1963) 5

Slack v. McDaniel, 529 U.S. 473 (2000).....*passim*

St. Martin Evangelical Lutheran Church v. South Dakota,
451 U.S. 772 (1981) 23

Stewart v. Martinez-Villareal, 523 U.S. 637 (1998) . 6, 9, 26

Stone v. Powell, 428 U.S. 465 (1976) 7

Swain v. Pressley, 430 U.S. 372 (1977) 25

TVA v. Hill, 437 U.S. 153 (1978) 3

United States v. Beggerly, 524 U.S. 38 (1998)..... 11, 14

United States v. Clark, 445 U.S. 23 (1980) 23

United States v. Mendoza, 464 U.S. 154 (1984) 12

United States v. United Cont'l Tuna Corp.,
425 U.S. 164 (1976) 12

Wainwright v. Norris, 958 F. Supp. 426
(E.D. Ark. 1996)..... 6

Weinberger v. Romero-Barcelo,
456 U.S. 305 (1982) 21, 22

Wong Doo v. United States, 265 U.S. 239 (1924)..... 9, 12

Woodford v. Garceau, 538 U.S. 202 (2003)..... 10

Constitutional Provisions

U.S. Const. art. I, § 9 24

U.S. Const. amend. V 27

Rules and Statutes

Fed. R. Civ. P. 60 .....*passim*

Fed. R. Crim. P. 36..... 22

28 USC § 1738 5

28 U.S.C. § 2072(a)..... 4

28 U.S.C. § 2074(a)..... 4

28 U.S.C. § 2244 .....*passim*

28 U.S.C. § 2254 .....*passim*

Fed. R. Habeas Corpus 11 3

Miscellaneous

Hertz & Liebman, *Federal Habeas Corpus Practice and Procedure*, § 7.2d, at 341 (4th ed. 2001)..... 24

BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

INTERESTS OF *AMICI CURIAE*

The NACDL, a nonprofit corporation, is the only national bar association working in the interest of public and private criminal defense attorneys and their clients. NACDL was founded in 1958 to ensure justice and due process for persons accused of crimes; foster the integrity, independence and expertise of the criminal defense profession; and promote the proper and fair administration of justice.[1] NACDL has 10,000 members nationwide -- joined by 80 state and local affiliate organizations with 28,000 members -- including private criminal defense lawyers, public defenders and law professors committed to preserving fairness within America's criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization with full representation in its House of Delegates. In this case, the NACDL is concerned that adoption of the Eleventh Circuit's holding will deprive hundreds of federal habeas petitioners any ability to obtain a valid review of the merits of their claims challenging the legality of their detentions.

SUMMARY OF THE ARGUMENT

In finding that restrictions on second or successive habeas applications established by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. §2244, preclude use of Rule 60(b) of the Federal Rules of Civil Procedure to reopen a final judgment rendered by a federal district court, the Eleventh Circuit held, in effect, that AEDPA worked an implied repeal of Rule 60(b). It is well-settled that repeals by implication are disfavored. This Court

---

[1] No counsel for any party has authored this brief in whole or in part, and no person or entity, other than NACDL, made any monetary contribution to its preparation or submission. *See* Rule 37.6, Sup. Ct. Rules. The parties have consented to the filing of this brief, and letters of consent have been lodged with the Clerk of the Court. Rule 37.3(a).

will therefore not find an existing statute or codified rule of civil procedure to be silently overruled by a new statute, unless the statutes are in irreconcilable conflict. Moreover, this Court has an obligation to construe both provisions to avoid conflict. The Court also must adopt the interpretation of AEDPA that avoids grave constitutional concerns.

The Court should not find that AEDPA impliedly repealed Rule 60(b) because no irreconcilable conflict exists. The judicially created limitations on successive and abusive habeas applications, established prior to AEDPA and codified in stricter form, long have co-existed with motions to vacate judgments. Successive habeas petitions and Rule 60(b) motions are distinct applications to the court, which serve different purposes, raise different issues, seek different relief, and thus do not overlap. A second or successive petition is one filed after an initial petition was resolved on the merits, asserting claims of unconstitutionality in a petitioner's state conviction, sentence, or detention. A Rule 60(b) motion, on the other hand, seeks to reopen a judgment, not simply to revisit the merits, but on the ground that a defect in the federal habeas proceeding deprives that judgment of legitimacy or integrity. Further, Rule 60(b) is the codification of the trial court's traditional equitable power to control its judgments, a power this Court should be especially reluctant to hold was abrogated, absent express language to that effect. Finally, the Eleventh Circuit's holding that AEDPA impliedly repealed Rule 60(b) in the habeas context raises grave constitutional concerns over suspension of the writ of habeas corpus and violation of due process of law.

ARGUMENT

I.
AEDPA'S LIMITATIONS ON SUCCESSIVE HABEAS APPLICATIONS DID NOT REPEAL RULE 60(b).

It is a cardinal rule of statutory construction that repeals by implication are not favored. *See Branch v. Smith*,

538 U.S. 254, 273 (2003); *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 442 (1987); *TVA v. Hill*, 437 U.S. 153, 189 (1978); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976); *Rail Act Cases*, 419 U.S. 102, 133 (1974). Where there is total silence, as in this case, finding repeal is even more dangerous. "Inferring repeal from legislative silence is hazardous at best, and error seems overwhelmingly likely in the notion" that a statute wordlessly redefined a pre-existing law. *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 132 (2003). There are two narrowly drawn exceptions to the prohibition against repeals by implication: (1) Where provisions in the two acts are in irreconcilable conflict, such that the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute. *See Posadas v. National City Bank of N.Y.*, 296 U.S. 497, 503 (1936).

The interpretive canon that implied repeals are disfavored applies not only to a purported repeal of a pre-existing statute but also to a purported to repeal of a rule of procedure. *See Califano v. Yamasaki*, 442 U.S. 682, 699 (1979) (stating that the Court will apply Federal Rules of Civil Procedure to all civil matters absent "a direct expression by Congress"); *Callihan v. Schneider*, 178 F.3d 800, 802 (6th Cir. 1999) (stating that "restriction on Congress's power to amend the federal rules is the general disfavor with which courts view implicit amendments or repeals"). Given that the habeas provisions of AEDPA do not cover the entire subject of relief from prior judgments, such that they can be said to constitute a substitute for Rule 60(b), the important question is whether there is an irreconcilable conflict between § 2244(b)(1) and Rule 60(b). To imply repeal, there must be a "positive repugnancy" between the statutes that cannot be reconciled. *Rail Act Cases*, 419 U.S. at 134.[2]

---

[2] This approach mirrors the dictates of Rule 11 of the Federal Rules Governing 28 U.S.C. § 2254 Cases, which provides, "The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with

A.
AEDPA did not repeal Rule 60(b) by implication because there is no irreconcilable conflict between AEDPA and Rule 60(b)

Rule 60(b) is a codified rule of civil procedure that "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Klapprott v. United States*, 335 U.S. 601, 614-15 (1949). Rule 60(b) is the product of the Court's effort to codify and expand pre-existing common law writs to make courts' power to reopen their judgments "complete." *See* Fed. R. Civ. P. 60 advisory committee's note to 1948 Amendment; *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 233-34 (1995). This Court enacted Rule 60(b) pursuant to the delegation of the Rules Enabling Act, 28 U.S.C. § 2072(a), and Congress is deemed to have adopted the rule by declining to disapprove of it, pursuant to 28 U.S.C. § 2074(a). *See Davis v. United States*, 411 U.S. 233, 242 (1973).

In the instant case, the issue is whether certain provisions of AEDPA affect a repeal of Rule 60(b) in the federal habeas context. Section 2244(b)(1) states, "a claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." 28 U.S.C. § 2244(b)(1).[3] The plain language neither references Rule 60(b) itself nor otherwise evidences congressional consideration of district courts' power to grant motions to vacate, reconsider, or grant

---

these rules, may be applied, when appropriate, to petitions filed under these rules." *See Browder v. Director*, 434 U.S. 257, 270 (1978) (holding Rules 52(b) & 59 governing time limits applied to petitioner's motion to reconsider habeas judgment because of "the settled conformity of habeas corpus and other civil proceedings with respect to time limits on post judgment relief"); *cf. Harris v. Nelson*, 394 U.S. 286, 289-90 (1969) (finding broad discovery provisions of Rule 33 inapplicable to habeas proceedings because they were innovative and because of the historical lack of such discovery practice in habeas proceedings).

[3] Petitions that raise new claims are subject to the restrictions in § 2244(b)(2) and may be filed in certain circumstances.

relief from a judgment. Consequently, § 2244(b)(1) is not a direct repeal of 60(b), and the only way to construe § 2244(b)(1) as affecting Rule 60(b) is to find a repeal by implication.

This Court repeatedly has shown an unwillingness to find irreconcilable conflict and imply repeal, even in cases involving more specific statutory language and history than the legislative silence present in this case. *See, e.g., Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 469-70 (1982) (finding provisions of Title VII allowing for federal suit after "final findings [of] State proceedings" did not repeal 28 U.S.C. § 1738, which requires federal courts to give preclusive effect to state court judgments); *Allen v. McCurry*, 449 U.S. 90, 100 (1980) (holding that 42 U.S.C. § 1983, did not overrule doctrine of preclusion, codified § 1738, despite legislative history showing that Congress was concerned with deficient state judgments); *Radzanower*, 426 U.S. at 155 (holding that venue provision of Securities Exchange Act did not repeal or amend venue provision of the National Bank Act); *Rail Act Cases*, 419 U.S. at 130 (holding that provisions of Rail Act limiting government payouts to rail companies did not repeal Tucker Act provisions allowing for takings suits against government); *Silver v. New York Stock Exch.*, 373 U.S. 341, 362 (1963) (holding that Securities Exchange Act scheme of self-regulation did not repeal Sherman antitrust laws).

The plain language of AEDPA does not indicate an irreconcilable conflict with Rule 60(b). AEDPA's silence on Rule 60(b) is even more compelling in light of the historical use of the Rule to challenge flawed habeas judgments. *See Browder v. Director*, 434 U.S. 257, 263 & n.8 (1978) (assuming availability of Rule 60(b) relief from habeas judgments); *Id.* at 273-74 (Blackmun, J., concurring); *Pitchess v. Davis*, 421 U.S. 482, 490 (1975) (reading Rule 60 and 28 U.S.C. § 2254 together); *Cornell v. Nix*, 119 F.3d 1329, 1332-33 (8th Cir. 1997); *Hunt v. Nuth*, 57 F.3d 1327, 1339-40 (4th Cir. 1995); *Mohammed v. Sullivan*, 866 F.2d 258, 260 (8th Cir. 1989); *Ritter v. Smith*, 811 F.2d 1398, 1401 (11th Cir. 1987); *Matarese v. LeFevre*, 801 F.2d 98, 106-07 (2d Cir. 1986). Congress is presumed to legislate

against a background of existing law, scholarship, and history. *National Archives and Records Admin. v. Favish*, 124 S. Ct. 1570, 1579 (2004). In addition, the legislative history of AEDPA, although admittedly sparse in all contexts, does not indicate that § 2244(b)(1) was intended to eclipse Rule 60(b).

Some lower courts have held that there is an irreconcilable conflict between AEDPA and Rule 60(b) because § 2244(b)(1)'s ban on second or successive same-claim applications broadly prohibits a petitioner from filing anything in district court after his initial habeas petition has been dismissed. *See, e.g., Wainwright v. Norris*, 958 F. Supp. 426, 431 (E.D. Ark. 1996) (dismissing under § 2244(b)(1) a claim that was not "successive" because it was a "second" filing in the district court). This Court, however, rejected such an interpretation in *Stewart v. Martinez-Villareal*, 523 U.S. 637, 645 (1998), holding that a second same-claim habeas petition filed after the district court had dismissed the initial petition[4] as premature was not a successive application within the meaning of § 2244(b). Rejecting the state's argument that the petition was successive because it followed a dismissed petition, this Court observed, "This may have been the second time that respondent had asked the federal courts to provide relief on his *Ford* claim, but this does not mean that there were two separate applications, the second of which was necessarily subject to § 2244(b)." *Id.* at 643. The Court relied on pre-AEDPA decisional law construing the meaning of "successive application" to conclude that a same-claim petition filed by a prisoner whose first federal habeas petition had been dismissed for technical procedural reasons, is simply not a successive application. *Id.* at 644-45.

Thus, this Court has refused to endorse the conclusion that § 2244(b)(1) precludes the filing of any motion in the district court after resolution of the initial habeas petition. The question then becomes whether §

[4] Defendant had asserted that he was incompetent to be executed and requested relief pursuant to *Ford v. Wainwright*, 477 U.S. 399 (1986). *Martinez-Villareal*, 523 U.S. at 640.

2244(b)(1), while not intended to prevent re-filing all claims, nonetheless was intended to preclude Rule 60(b) motions. An understanding of the evolution of the meaning of "successive application" in habeas corpus jurisprudence leads inexorably to the conclusion that Congress did not intend to prevent Rule 60(b) relief from erroneous habeas judgments.

This Court has stated that the meaning of "successive application," as used in AEDPA, can be determined by reference to pre-AEDPA law. *See Slack v. McDaniel*, 529 U.S. 473, 483 (2000) ("AEDPA's present provisions . . . incorporate earlier habeas corpus principles."); *Felker v. Turpin*, 518 U.S. 651, 664 (1996) (stating that AEDPA "codifies some of the preexisting limits on successive petitions"). "The phrase 'second or successive petition' is a term of art given substance in [the Court's] prior habeas corpus cases." *Slack*, 529 U.S. at 476.[5]

Historically, habeas petitioners possessed broad ability to file repetitious petitions and claims. Habeas corpus jurisprudence evolved on a backdrop of filing permissiveness because "the government must always be accountable to the judiciary for a man's imprisonment." *Fay v. Noia*, 372 U.S. 391, 402 (1963). The Court recognized that "conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review." *Id.* at 424; *see also Stone v. Powell*, 428 U.S. 465, 519 (1976). Eventually, however, this Court identified three types of claims excepted from the permissive filing standards: "(a) *successive claims* that raise grounds identical to grounds heard and decided on the merits in a previous petition; (b) new claims, not previously raised which constitute an *abuse-of-the-writ* ; [and] (c) *procedurally defaulted claims* in which the petitioner failed to follow applicable state procedural rules in raising the claims."

[5] There is no definition of "second or successive application" in the legislation or legislative history of AEDPA.

Sawyer v. Whitley, 505 U.S. 333, 338 (1992) (emphasis in original, citations omitted).

Each of these categories stood as distinct exceptions to traditionally liberal habeas filing. Defendants who had defaulted in state court, absent a showing of cause and prejudice, were precluded from federal habeas relief because of concerns over waiver and state comity. *See Fay*, 372 U.S. at 439 (holding that certain procedural defaults amounted to "an intentional relinquishment or abandonment of a known right or privilege") (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)); *Murray v. Carrier*, 477 U.S. 478, 487 (1986) (holding that default "exacts an extra charge by undercutting the State's ability to enforce its procedural rules") (quoting *Engle v. Isaac*, 456 U.S. 107, 129 (1982)). Similarly, petitioners who raised previously available new claims in a second habeas petition, known as abuse-of-the-writ, were not entitled to a review on the merits. This Court emphasized the concept of waiver to justify barring such litigants from obtaining review on the merits of their new claims. *See Sanders v. United States*, 373 U.S. 1, 17 (1963) (relying on "the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks"). Thus, "both the abuse-of-the-writ doctrine and . . . procedural default jurisprudence concentrate on a petitioner's acts to determine whether he has a legitimate excuse for failing to raise a claim at the appropriate time." *McCleskey v. Zant*, 499 U.S. 467, 490 (1991).

The abuse-of-the-writ doctrine, codified by AEDPA in § 2244(b)(2), and procedural default rules, survive today. *See Dretke v. Haley*, 124 S. Ct. 1847, 1851-52 (2004) (confirming that a petitioner in procedural default is permitted habeas review only upon a showing of cause and prejudice). These doctrines rest on the notion that a petitioner's fault, which poses a cost to the state and society, deprives that petitioner of his very important right to habeas merits review. This Court has contrasted such petitioners with those who file petitions in a proper manner. Recognizing the cost of continued habeas litigation, the Court nonetheless observed:

> The federal writ of habeas corpus overrides all these considerations, essential as they are to the rule of law, when a petitioner raises a meritorious constitutional claim in a proper manner in a habeas petition. Our procedural default jurisprudence and abuse-of-the-writ jurisprudence help define this dimension of procedural regularity. Both doctrines impose on petitioners a burden of reasonable compliance with procedures designed to discourage baseless claims and to keep the system open for valid ones.

McCleskey, 499 U.S. at 493.

In contrast to abuse-of-the-writ and procedural default rules, which relieve a federal court of the obligation to conduct a merits review, the ban on successive petitions does not relieve a federal court of its initial duty to conduct a merits review, but rather stands for the principle that federal habeas litigants are not necessarily entitled to multiple merits reviews. In *Sanders*, 373 U.S. at 15, this Court defined a "successive" application, as arising when "(1) the same ground presented in the subsequent application was determined adversely to the applicant . . . and (2) the prior determination was *on the merits.*" (emphasis added). *See also Kuhlmann v. Wilson*, 477 U.S. 436, 451 (1986) ("It is clear that Congress intended for district courts, as a general rule, to give preclusive effect to a judgment denying *on the merits* a habeas petition alleging grounds identical in substance to those raised in the subsequent petition.") (emphasis added); *Wong Doo v. United States*, 265 U.S. 239, 241 (1924); *Salinger v. Loisel*, 265 U.S. 224, 232 (1924). Post-AEDPA, this Court has continued to interpret "successive petition" as one filed after a previous resolution on the merits. *See Slack*, 529 U.S. at 485-86 ("A habeas petition filed in the district court after an initial habeas petition was *unadjudicated on its merits* . . . is not a second or successive petition.") (emphasis added);[6] *Martinez-*

---

[6] Although Slack had commenced his habeas petition before the passage of AEDPA, the Court explicitly stated, "[W]e do not suggest the

Villareal, 523 U.S. at 645 (holding that a petition is not successive when "the habeas petitioner [did] not receive an adjudication of his claim" in the first petition).

Consequently, a careful analysis of the evolution of habeas filing restrictions reveals several important principles. The most important is the enduring concept that a habeas petitioner is entitled to at least one valid review on the merits of his challenge to the legality of his detention. *See Woodford v. Garceau*, 538 U.S. 202, 207 (2003) (holding that the essence of a claim for habeas relief is a request for review on the merits); *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996) (stating that dismissal of first habeas denies petitioners protection of the Writ). The evolving restrictions on habeas litigation carved out limited circumstances in which a petitioner could be denied merits review, namely unexcused procedural default and abuse-of-the-writ. *See Sawyer*, 505 U.S. at 338. And after the first merits review of a petitioner's claims, the petitioner was not necessarily entitled to duplicative merits reviews. *See Kuhlmann*, 477 U.S. at 451.

Given this evolution, it is clear that a ban on "successive applications" is not meant to disallow Rule 60(b) motions. A successive application is a petition, filed after a valid merits review, which seeks to relitigate the merits of petitioner's substantive claims challenging his detention. A Rule 60(b) movant does not seek to relitigate the merits of a claim, but rather asserts that he never received a valid merits review, either because the district judge, through error, refused to consider the merits, as in Gonzalez's case, or because the decision on the merits lacked integrity. *See Abdur'Rahman v. Bell*, 537 U.S. 88, 95-96 (2002) (Stevens, J., dissenting from dismissal of writ of certiorari) ("A Rule 60(b) motion is designed to cure procedural violations in an earlier proceeding—here, a habeas proceeding—that raise questions about that proceeding's integrity.") (quoting *Mobley v. Head*, 306 F.3d 1096, 1101 (11th Cir. 2003) (Tjoflat, J., dissenting) (vacated panel opinion)). A Rule

definition of second or successive would be different under AEDPA." *Slack*, 529 U.S. at 486.

60(b) motion contests the integrity or etiology of the district court's final judgment; it does not revisit constitutional issues already resolved on the merits. *See Abdur'Rahman*, 392 F.3d at 179; *Rodriguez v. Mitchell*, 252 F.3d 191, 199 (2d Cir. 2001); *Rodwell v. Pepe*, 324 F.3d 66, 71 (1st Cir. 2003). Consequently, permitting 60(b) movants the chance to obtain a true first merits review is completely consistent with § 2244(b)(1)'s ban on "successive applications," which seek to prevent duplicative merits reviews.

Moreover, Rule 60(b) movants are not similarly situated to the narrow class of habeas petitioners traditionally disallowed relief. The only petitioners not entitled to a merits review are those who, through their own unexcused behavior, have defaulted or failed to raise available claims. *McCleskey*, 499 U.S. at 490. By contrast, Rule 60(b) movants have abided by required procedures, but were unable to obtain a true merits review, not because of their unexcused culpable behavior, but rather because of some extraordinary circumstance. *See Liljeberg v. Health Serv. Acquisition Corp.*, 486 U.S. 847, 863-64 (1988) (holding that Rule 60(b) applies in extraordinary circumstances).[7] Thus, in banning "successive applications," Congress did not mean to preclude faultless petitioners from obtaining relief from grossly unjust habeas judgments. *See United States v. Beggerly*, 524 U.S. 38, 46 (1998) (holding that Rule 60(b) is meant to remedy gross injustices).

Given that there is no conflict indicated by the plain language, legislative history, or historical underpinnings of AEDPA, the court below relied on a characterization of the statute's broad purposes to justify its conclusion that § 2244(b) conflicts with Rule 60(b). *Gonzalez*, 366 F.3d at

[7] In addition, Rule 60(b) review does not implicate state comity concerns in the same manner as review of procedurally defaulted claims. Rule 60(b) challenges the federal district court's review as tainted by extraordinary circumstances, but in no way affects or seeks to supplant state procedural rules. The concern that allowing petitioners who have procedurally defaulted to obtain habeas review will encourage defendants not to comply with state procedures has no application to the 60(b) movant.

1269-70. The court sought to derive specific congressional intent from its own conclusion that "[t]he central purpose behind the AEDPA was to ensure greater finality of state and federal court judgments in criminal cases." *Id.* at 1269. This Court has, however, specifically rejected the notion that a court can rely on its characterization of a statute's broad objective to find a specific congressional directive. *See Rodriguez v. United States*, 480 U.S. 522, 535-36 (1987) (holding that lower court "impermissibly" relied on "its understanding of the broad purposes of" a statute to imply a repeal); *United States v. United Cont'l Tuna Corp.*, 425 U.S. 164, 169 (1976) (holding that the court "would normally expect some expression by Congress" that a repeal is intended); *Rail Act Cases*, 419 U.S. at 134 (stating that "it is reasonable for a court to insist on the legislature's using language showing that it has made a considered determination to that end") (quoting lower court opinion).

In addition, the broad purpose of AEDPA does not support the court of appeals' conclusion that Rule 60 is inconsistent with AEDPA, given the evolution of res judicata rules in habeas corpus jurisprudence. Res judicata is the principle that "a final judgment on the merits bars further claims by parties or their privies on the same cause of action." *United States v. Mendoza*, 464 U.S. 154, 159 n.3 (1984); *see also Montana v. United States*, 440 US 147, 153 (1979); *Parklane Hosiery v. Shore*, 439 U.S. 322, 326 n.5 (1979). The purpose of the rule is manifold. The Court has explained that "preclud[ing] parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana*, 440 U.S. at 153-54.

"At common law, res judicata did not attach to a court's denial of habeas relief." *McCleskey*, 499 U.S. at 479; *see also Sanders*, 373 U.S. at 7 (stating that the inapplicability of res judicata stems "from the earliest days of habeas corpus jurisdiction"). As habeas relief expanded and courts of appeals obtained jurisdiction, this Court began

to restrict seriatim filing of same-claim habeas petitions by permitting district courts, in certain circumstances, to dismiss successive petitions. *See Wong Doo*, 265 U.S. at 241. Prior to AEDPA, the rule governing dismissal of successive petitions was that district courts should dismiss successive petitions unless the "ends of justice" required a duplicative review. *Kuhlmann*, 477 U.S. at 451. This rule sought to balance "Congress' intent to give finality to federal habeas judgments with the historic function of habeas corpus to provide relief from unjust incarceration." *Id.* at 451-52.[8]

AEDPA amended § 2244(b) to direct that successive same-claim habeas petitions "shall" be dismissed, without exception. This Court has described the restrictions on successive filing as a "modified res judicata rule," *Felker*, 518 U.S. at 664, leading some lower courts to conclude that, even after AEDPA, res judicata principles remain inapplicable in habeas proceedings. *See Muniz v. United States*, 236 F.3d 122, 126 (2d Cir. 2001) (holding that "AEDPA did not abrogate the well-settled traditional rule" that res judicata does not apply in habeas proceeding). Even assuming, *arguendo*, that AEDPA was meant to import res judicata into habeas litigation to the same extent as in ordinary civil litigation, it still does not follow that Congress intended to preclude the filing of Rule 60(b) motions.

Res judicata is predicated on an assumption that the judgment given preclusive effect followed a "full and fair" proceeding. *Montana*, 440 U.S. at 153-54. For this reason, Rule 60(b) has always operated as an exception to the res

---

[8] In 1963, the Court recognized that district courts had discretion to dismiss successive applications, unless the "ends of justice" required a successive merits review. This decision was based, in part, on the version of § 2244 in effect at that time, which permitted a judge to dismiss a successive application only when "satisfied that the ends of justice will not be served by such inquiry." *Sanders*, 373 U.S. at 12. *Kuhlmann* was decided in 1986, after passage of the 1966 amendments to § 2244(b), which preserved discretion to entertain successive petitions but eliminated the "ends of justice" inquiry. 477 U.S. at 451. *Kuhlman* preserved the "ends of justice" standard, but narrowed the standard by limiting it to petitioners who could supplement their constitutional claims with a colorable showing of factual innocence. *Id.* at 454.

judicata bar on successive litigation. *See Arizona v. California*, 460 U.S. 605, 619 (1983) ("It is clear that res judicata and collateral estoppel do not apply if a party moves the rendering court in the same proceeding to correct or modify its judgment."). "Rule 60(b) is . . . reserved for those cases of 'injustices which, in certain instances are deemed sufficiently gross to demand a departure' from the rigid adherence to the doctrine of res judicata." *Beggerly*, 524 U.S. at 46 (quoting *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238, 244 (1944)). As a result, the fact that habeas jurisprudence has moved toward greater finality does not mean that Congress intended to displace a well-settled exception to the principle of res judicata.

B.

Allowing Rule 60(b) relief will not circumvent the restrictions in AEDPA and the Court has an obligation to adopt the interpretation that preserves Rule 60(b) to the greatest extent

The above discussion demonstrates that neither the plain language, legislative history, meaning of the terms as understood in the context of pre-existing law, or even broad purpose of AEDPA evidence an irreconcilable conflict with Rule 60. If, however, this Court does find some indication of inconsistency between AEDPA and Rule 60(b), the Court has an obligation to reconcile the provisions before finding any repeal. "[W]hen two statutes are capable of co-existence, it is the duty of the courts . . . to regard each as effective." *Radzanower*, 426 U.S. at 155 (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)). The Court should construe the later act as a continuation of, not substitute for, the first, *see Posadas*, 296 U.S. at 503, and any repeal should be implied "only to the minimum extent necessary." *Radzanower*, 426 U.S. at 155.

The Eleventh Circuit feared that unbridled application of Rule 60(b) "would effectively erase from the books the more recent and more specific statutory requirement" contained in AEDPA. *Gonzalez*, 366 F.3d at 1271. The court contended that "[t]he discretion to reopen

final judgments contemplated in most of the provisions of Rule 60(b) cannot co-exist in a habeas case with § 2244(b)." *Id.* at 1271. This contention, however, was predicated on a misunderstanding of the scope of Rule 60(b). The analysis below demonstrates that preserving full Rule 60(b) relief will not, in fact, conflict with the prohibition against successive applications.

1.

Rule 60(b) retains a distinct scope that does not overlap or conflict with § 2244

Rule 60(b) and AEDPA can co-exist consistently because, as recognized by lower courts, a Rule 60(b) motion seeks different relief based on different grounds than a successive habeas petition. *See Abdur'Rahman*, 392 F.3d at 179 ("[T]he significant functional differences between Rule 60(b) motions and habeas petitions . . . mean that many Rule 60(b) motions will not run afoul of AEDPA.").

First, the immediate objective of a Rule 60(b) motion is not to secure release from detention but "merely [to] reinstate[] the previously dismissed habeas petition, opening the way for further proceedings." *See id.*, 392 F.3d at 179; *Rodriguez*, 252 F.3d at 198. Rule 60(b) motions suggest to a federal court that its earlier judgment rests on a defective foundation, *see Abdur'Rahman*, 392 F.2d at 179, but granting that motion will not, by itself, invalidate the underlying conviction and/or sentence. *Id.* at 180.

Second, and more important, permissible grounds for a Rule 60(b) motion are distinct from the grounds raised in any petition for habeas corpus relief, whether original or successive. A habeas petition asserts that a prisoner is "in custody in violation of the Constitution or laws or treaties of the United States," 28 U.S.C. § 2254(a), as a result of federal constitutional defects that occurred in the state criminal process. *See id.*, 392 F.3d at 179-80; *Rodwell*, 324 F.3d at 70; *Rodriguez*, 252 F.3d at 199. A second or successive habeas petition thus seeks to relitigate previously resolved constitutional claims in an effort to demonstrate for the second time that the petitioner's detention is illegal.

In contrast, Rule 60(b) motions raise issues that have no basis in the Constitution of the United States and that "may well have nothing to do with the alleged violations of federal rights." *Rodriguez*, 252 F.3d at 199. The factual predicate of a proper Rule 60(b) motion deals with a procedural defect or irregularity in the manner in which the federal district court initially rejected the petition containing the arguments about constitutional violations at the state trial. *Abdur'Rahman*, 392 F.3d at 181; *Rodwell*, 324 F.3d at 70. The legal predicate of the Rule 60(b) motion is the federal court's interpretation and application of federal procedural statutes and rules. *See Abdur'Rahman*, 537 U.S. at 95-96 (Stevens, J., dissenting from dismissal of writ of certiorari).[9]

A Rule 60(b)(6) motion thus challenges not the constitutionality of the underlying criminal proceedings, but rather the integrity of the federal district court's decision. Rule 60(b)(6) allows courts to reopen judgments for "any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(6). The court of appeals asserted that no part of Rule 60(b) could do "more harm to the finality of judgments" than 60(b)(6)). *Gonzalez*, 366 F.3d at 1271. However, Rule 60(b)(6) does not exist in a vacuum and does not permit review and relief every time a movant asserts that the judgment is wrong. The law is well-settled that Rule 60(b)(6) applies only in truly exceptional or extraordinary circumstances. *See Liljeberg*, 486 U.S. at 863. Mere intervening changes or developments in law, by themselves, rarely will provide sufficiently extraordinary circumstances. *See Agostini v. Felton*, 521 U.S. 203, 239 (1997).

[9] For example, a motion under Rule 60(b)(1) seeking to vacate a judgment because of "mistake, inadvertence, surprise, or excusable neglect" asserts that the respondent engaged in unfair surprise in the federal habeas proceeding by failing to notify the petitioner of the witnesses to be called at the hearing, but says absolutely nothing about unfair surprise in the underlying state criminal trial. *See Rodriguez*, 252 F.3d at 199.

For example, a prisoner whose motion challenges the district court's rejection of his claim of constitutional violation in the state criminal proceeding, on the grounds that the substantive law has changed, has filed a successive application and cannot rely on Rule 60(b). *See Abdur'Rahman*, 392 F.3d at 185. The rule is unavailable because the change does not render erroneous anything about the process by which the district court rejected the petition. *Id.*[10] On the other hand, Rule 60(b)(6) remains the proper vehicle when the change in law reveals that the district court's procedural decision was erroneous and that error deprived the petitioner of any merits review.

Mr. Gonzalez presents an extraordinary circumstance that properly provides the basis for Rule 60(b) relief. The clarification in law in the instant case evidences a defect not in the underlying state proceedings, but in the district court's dismissal of his habeas petition on federal procedural grounds. The district court never reached, considered, or resolved the merits of Mr. Gonzalez's claims that his guilty plea in state court was unconstitutionally unintelligent, unknowing, and involuntary. *Gonzalez*, 366 F.3d at 1261. Rather, the court dismissed the petition as time-barred, on the ground that it had not been filed within AEDPA's one year limitations period. *Id.*; 28 U.S.C. § 2244(d)(1). Subsequently, this Court clarified in *Artuz v. Bennett*, 531 U.S. 4, 8 (2000), that a petition for state collateral relief was

[10] This petitioner could not properly seek 60(b)(6) relief, and his recourse would be to bring a successive habeas petition, characterize the claim as a new claim because of the change in law, and argue for relief on the basis of § 2244(b)(2)(A), which permits the court to consider a new-claim successive petition that relies on a new rule of constitutional law made retroactive.

There may, however, be extraordinary circumstances, in which fundamental justice dictates that certain petitions be revisited subsequent to a change of substantive law, for example, petitions by mentally retarded death row inmates to revisit their habeas claims in light of *Atkins v. Virginia*, 536 U.S. 304 (2002). Courts of appeals will have to decide whether granting 60(b)(6) relief to such movants is an abuse of discretion in light of AEDPA. *See Calderon v. Thompson*, 523 U.S. 538, 554 (1998) (holding that abuse of discretion standard is defined in part by AEDPA).

"properly filed" when it had been delivered and accepted in compliance with state rules. As a result, Mr. Gonzalez's original and only petition was timely filed, and the district court's judgment was plainly incorrect in light of *Artuz*.

Mr. Gonzalez's subsequent Rule 60(b) motion challenged only the district court's purely procedural ruling as to timing. It focused entirely on litigation in the federal district court and that court's resolution of the petition. The Rule 60(b) motion in no way implicated anything that occurred in state court, but instead asserted that the erroneous procedural ruling deprived the federal court's judgment of required integrity. *See Abdur'Rahman*, 392 F.3d at 179; *Rodriguez*, 252 F.3d at 199; *Rodwell*, 324 F.3d at 71. Mr. Gonzalez's case is "exceptional" for purposes of Rule 60(b)(6), not a case of run-of-the-mill legal error, because the district court's erroneous procedural ruling deprives him of any opportunity to obtain federal review of the merits of his claims that his detention is unconstitutional.[11]

As Justice Stevens correctly stated in *Abdur'Rahman*, whether one ultimately agrees that a particular circumstance actually warrants Rule 60(b) relief is separate from whether it is proper for the district court to consider a Rule 60(b) motion in the first instance. 537 U.S. at 97 (Stevens, J., dissenting from dismissal of writ of certiorari). This much, however, is clear: Mr. Gonzalez's situation is the type of extraordinary circumstance "justifying relief from the operation of the judgment" under Rule 60(b)(6) and warranting direct consideration by the district court.

The reasonable interpretation of Rule 60(b) thus establishes consistency between the rule and § 2244(b) such

---

[11] Some courts have indicated that even a valid dismissal of an untimely federal habeas petition should not unequivocally bar the petitioner from merits review. *See e.g., Rosa v. Senkowski*, 1997 WL 436484, at *5 (S.D.N.Y. 1997) (holding that strict application of AEDPA's time limits, without a showing of prejudice to the state, violates suspension clause); *cf. Rodriguez v. Artuz*, 990 F. Supp. 275, 281-82 (S.D.N.Y. 1998) (holding that AEDPA's time limits do not violate the suspension clause "per se," but there may be cases in which strict application of time limits is unconstitutional, for example, where petitioner makes a showing of actual innocence).

that both retain effect. This Court must adopt an interpretation that allows the two rules to be read consistently so as to avoid repeal by implication. *See Kremer*, 456 U.S. at 468; *Radzanower*, 426 U.S. at 155. Allowing the petitioner to reopen the judgment (or to argue for the reopening of the judgment) in the instant action does no violence to the dictates or policies of § 2244(b). This type of Rule 60(b) motion is not inconsistent with, much less in irreconcilable conflict with, the restrictions in § 2244(b), making repeal by implication especially unwarranted. *See Crawford Fitting Co.*, 482 U.S. at 442.

2.

The Eleventh Circuit's treatment of Rule 60(b) is not a repeal to the "minimum extent necessary"

The Eleventh Circuit explicitly recognized that some limited portion of Rule 60(b) survived and could be reconciled with AEDPA. The court, however, preserved only 60(b)(3), which provides for relief from judgment due to "fraud . . . misrepresentation, or other misconduct of an adverse party," in habeas cases. *Gonzalez*, 366 F.3d at 1278. The majority held that the "state's interest in the finality of a judgment denying federal habeas corpus relief is not compelling if that judgment would not have been obtained but for fraud that its agents perpetrated upon the federal court." *Id.*

The court, however, never explained why fraud is so different from the rest of 60(b) as to constitute the lone surviving exception. As several lower courts have explained, fraud on the federal court certainly is not the only misconduct enumerated in Rule 60(b) that casts doubt on the legitimacy or integrity of a federal habeas judgment. *See id.* at 1297 (Tjoflat, J., specially concurring in part and dissenting in part); *see also Abdur'Rahman*, 392 F.3d at 180. The state does not have a greater interest in the finality of a federal judgment procured through mistake or surprise or, as here, one procured through an erroneous application of habeas procedures that deprives a state prisoner of any review of the merits of his underlying constitutional claims.

These judgments, like fraudulent judgments, lack integrity or legitimacy.

Because there is no meaningful difference between fraud and any of the other Rule 60(b) grounds, the Eleventh Circuit's virtual evisceration of 60(b), preserving only the fraud ground, was not a repeal to the "minimum [extent] necessary" required by *Radzanower,* 426 U.S. at 155. Saving only 60(b)(3), but finding the remainder of the rule repealed, is not the narrowest repeal possible to avoid a conflict. Rule 60(b) as a whole, and not just the fraud provision, survives without interfering with § 2244(b) or even AEDPA's broad policies. Thus, to avoid effecting an unjustified repeal by implication, this Court must preserve far more of Rule 60(b), including the 60(b)(6) grounds at issue in the instant case.

C.

AEDPA's limitations on successive habeas applications do not evidence congressional intent to displace a court's traditional equitable power to modify its judgments

One of the basic equitable powers of a court is the ability to modify its own judgments in extraordinary circumstances. *See Plaut*, 514 U.S. at 233. Rule 60(b) codified this equitable authority and clarified and expanded the circumstances in which it could be invoked. *See Bankers Mortgage Co. v. United States*, 423 F.2d 73, 77 (5th Cir. 1970) ("60(b) is a response to the plaintive cries of parties who have for centuries floundered, and often succumbed, among the snares and pitfalls of the ancillary common law and equitable remedies. It is designed to remove the uncertainties and historical limitations of the ancient remedies but to preserve all of the various kinds of relief which they offered."). The rule "reflects and confirms the courts' own inherent and discretionary power, 'firmly established in English practice long before the foundation of our Republic, to set aside a judgment whose enforcement would work inequity.'" *Plaut*, 514 U.S. at 233-24 (quoting *Hazel-Atlas Glass Co.*, 322 U.S. at 244). Consequently, a finding that § 2244(b)(1) supplants Rule 60(b) assumes not

only that Congress intended to impliedly repeal a codified rule, but also that Congress intended to displace the equitable power of a court to grant relief from its erroneous.

"Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. 'The great principles of equity, securing complete justice, should not be yielded to light inferences or doubtful construction.'" *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) (quoting *Brown v. Swann*, 35 U.S. (10 Pet.) 497, 503 (1836)). This Court does "not assume lightly that Congress has intended to depart from established [equitable] principles." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982). A statute must be construed "in favor of that interpretation which affords a full opportunity" for courts to exercise their traditional equity. *Hecht Co. v. Bowles,* 321 U.S. 321, 330 (1944).

AEDPA clearly does not, nor was it intended to, displace all of a court's common law or equitable authority. In *Felker*, 518 U.S. at 660-61, this Court demanded of Congress an explicit reference to its jurisdiction over original habeas petitions before it would conclude that AEDPA repealed that authority. The Court emphasized that other provisions of AEDPA expressly limited the Court's appellate jurisdiction over a court of appeals' denial of leave to file a second or successive petition or expressly amended procedural rules. *Id.* at 661 n.3. Finding no similar explicit reference to its original habeas jurisdiction, the Court held that it had not been limited.

When a statute has not "foreclosed the exercise of equitable discretion," as in the instant case, "the proper standard for appellate review is whether the District Court abused its discretion" in the exercise of its equitable powers. *Weinberger*, 456 U.S. at 320. In *Calderon v. Thompson*, 523 U.S. 538, 541-42 (1998), a case heavily relied on by the court below, this Court found that the Ninth Circuit had abused its discretion by recalling its earlier mandate denying habeas relief. The Eleventh Circuit's insistence that *Calderon* supports the position that AEDPA is meant to limit the review of Rule 60(b) motions, *see Gonzalez*, 366 F.3d at

1280-81, is simply misplaced. In *Calderon*, this Court held that courts of appeals maintained the equitable discretion to recall mandates, notwithstanding AEDPA. *Calderon*, 523 U.S. at 554. The Court nonetheless found that the Ninth Circuit had abused its discretion in recalling its mandate to "revisit the merits of its earlier decision denying habeas relief," because such duplicative merits review was not required by the ends of justice. *Id.* at 558-59.

Calderon in no way supports the proposition that district courts do not retain the equitable power to grant Rule 60(b) relief in extraordinary circumstances demonstrating that the district court judgment lacked integrity. As with the recall of the mandate at issue in *Calderon*, a district court's decision regarding a Rule 60(b) motion can be reviewed for abuse of discretion. *See Weinberger*, 456 U.S. at 320. The fact that, in *Calderon*, the Ninth Circuit abused its discretion in recalling a mandate in no way logically dictates that district courts do not retain discretion to review Rule 60(b) motions. Moreover, this Court limited its finding of abuse of discretion to the specific circumstances of the case.[12]

Conceivably, a district court could abuse its discretion by granting a Rule 60(b) motion without finding that one of the six predicates exist or solely to revisit its earlier merits decision. The fact, however, that a judge can abuse his discretion in granting equitable relief does not compel the conclusion that no judge should be able to exercise equitable power. Consequently, in the absence of

---

[12] The Court stated:

> We should be clear about the circumstances we address in this case. We deal not with the recall of a mandate to correct mere clerical errors in the judgment itself, similar to those described in Federal Rule of Criminal Procedure 36 or Federal rule of Civil Procedure 60(a). The State can have little interest, based on reliance or other grounds, in preserving a mandate not in accordance with the actual decision rendered by the court. This is also not a case of fraud upon the court, calling into question the very legitimacy of the judgment.

Calderon, 523 U.S. at 557 (citations omitted).

any language evidencing congressional intent to displace a court's ability to equitably review its own judgments, district courts retain the power to entertain Rule 60(b) motions, subject to abuse-of-discretion review.

II.
THIS COURT SHOULD INTERPRET AEDPA AND RULE 60 CONSISTENTLY TO AVOID A CONSTRUCTION THAT RAISES GRAVE CONSTITUTIONAL CONCERNS

"It is well settled that this Court will not pass on the constitutionality of an Act of Congress if a construction of the statute is fairly possible by which the question may be avoided." *United States v. Clark*, 445 U.S. 23, 27 (1980); *see also New York City Transit Auth. v. Beazer*, 440 U.S. 568, 582 & n.22 (1979). This canon "rest[s] on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Suarez Martinez*, 125 S. Ct. 716, 724 (2005). "It is not a method of adjudicating constitutional questions;" rather "it allows courts to *avoid* the decision of constitutional questions." *Id.* (emphasis in original). Avoiding constitutional problems is especially important when considering a purported repeal by implication. *See St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 788 (1981) ("Th[e] long-established canon of construction [against implied repeals] carries special weight when an implied repeal or amendment might raise constitutional questions.").

A.
Interpreting AEDPA as prohibiting Rule 60(b) relief raises grave concerns over unconstitutional suspension of the writ

Article I, § 9 of the United States Constitution states, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." *See also Rasul v. Bush*, 124 S. Ct. 2686, 2692 (2004). "[A]bsent suspension, the writ of habeas corpus remains available to every individual within the United States." *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2644 (2004).[13] "This Court has constantly emphasized the fundamental importance of the writ of habeas corpus in our constitutional scheme . . . The Court has steadfastly insisted that 'there is no higher duty than to maintain it unimpaired.'" *Johnson v. Avery*, 393 U.S. 483, 485 (1969). "[T]he writ 'has been for centuries esteemed the best and only sufficient defence of personal freedom.'" *Lonchar*, 517 U.S. at 324 (quoting *Ex parte Yerger*, 8 Wall. 85, 95 (1869)).[14]

This Court has previously addressed the constitutionality of AEDPA's new filing rules in a very general manner. In *Felker*, 518 U.S. at 664, the Court ruled that "[t]he added restrictions which the Act places on second habeas petitions are well within the compass of th[e] evolutionary process [of filing restrictions], and we hold that they do not amount to a 'suspension' of the writ contrary to Article I, § 9." *Id.* at 664. *Felker* assumes that prior to AEDPA, habeas filing restrictions were not so broad as to

[13] "Only in the rarest circumstances has Congress seen fit to suspend the writ. *See, e.g.*, Act of Mar. 3, 1863, ch. 81, § 1, 12 Stat. 755, Act of April 20, 1871, ch. 22, § 4, 17 Stat. 14. At all other times, it has remained a critical check on the Executive, ensuring that it does not detain individuals except in accordance with law." *Hamdi*, 124 S. Ct. at 2644 (2004).

[14] There has been some debate regarding the extent of Suspension Clause protection, given that during the Framers' time the writ was extremely limited. *See* Hertz & Liebman, *Federal Habeas Corpus Practice and Procedure*, § 7.2d, at 341 (4th ed. 2001). This Court has declined to interpret the Clause as only applying to the writ of the Framers' era. *See Felker*, 518 U.S. at 663-64 (assuming that "the Suspension Clause of the Constitution refers to the writ as it exists today"); *Swain v. Pressley*, 430 U.S. 372, 380-81 (1977) (rejecting that Suspension Clause "merely prohibits suspension of the writ as it was being used when the Constitution was adopted").

unconstitutionally suspend the writ. Whether the Eleventh Circuit's interpretation of § 2244(b)(1) renders the provision unconstitutional thus depends on whether it represents a departure from the evolution of filing restrictions. For many reasons, including those discussed in Part I *supra*, the court of appeals' approach represents a gross departure from the pre-AEDPA evolutionary process.

The evolving restrictions on habeas filings were limited by the principle that petitioners are entitled to at least one federal review of the merits of their constitutional claims. This Court has held that the test for suspension is whether the petitioner was denied an adequate and effective collateral vehicle to test the legality of his detention. *Swain v. Pressley*, 430 U.S. 372, 381 (1977). The Suspension Clause thus generally guarantees that a habeas petitioner will receive one full and fair review of the merits of his habeas corpus claims. *See Sanders*, 373 U.S. at 16-17 (holding that petitioner is guaranteed one "full and fair" merits review); *Rodriguez v. Artuz*, 990 F. Supp. 275, 282-83 (S.D.N.Y. 1998) ("[T]he guarantee against 'suspension' ... obligates Congress to provide one meaningful, nondiscretionary opportunity to secure federal review of federal claims.") (internal quotations omitted). This Court has held that "[d]ismissal of a first habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to the important interest in human liberty." *Lonchar*, 517 U.S. at 324.

Although petitioners are generally guaranteed one valid merits review, this Court has acknowledged that there are certain petitioners who may be prevented from obtaining a merits review without offending the Suspension Clause. Waiver and state comity concerns moved this Court to hold that petitioners who procedurally default or who raise new claims in a second petition could be barred from merits review. Nonetheless, to prevent this bar from constituting unconstitutional suspension, the Court preserved merits review for those who could show cause and prejudice or actual innocence. *See Murray*, 477 U.S. at 496; *Francis v. Henderson*, 425 U.S. 536, 542 (1976). Thus, even though such litigants were culpable in their failure to follow state

rules or to raise ripe claims and that failure adversely affected the state's interest, fundamental justice dictated that they still could retain some avenues toward merits review. *See Engle*, 456 U.S. at 134 ("In appropriate cases th[e] principles of [finality and comity] must yield to the imperative of correcting a fundamentally unjust incarceration. [W]e are confident that victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard.").

Although certain culpable behavior on the part of a petitioner could disentitle him to a merits review, this Court has recognized that not all culpable behavior allows a court to deny the right to a valid merits review. In *Martinez-Villareal*, the Court declined to interpret AEDPA as preventing a petitioner whose initial *Ford* claim was dismissed as premature from obtaining merits review, holding that "the implications [of such an interpretation] for habeas practice would be far reaching and seemingly perverse." 523 U.S. at 644. This Court also indicated that federal habeas petitioners are entitled to a merits review even when their initial petitions have been dismissed for failure to exhaust state remedies, *see id.*; *Slack*, 529 U.S. at 487, or failure to pay filing fees. *See Martinez-Villareal*, 523 U.S. at 645 (citing *United States ex rel. Barnes v. Gilmore*, 968 F. Supp. 384, 385 (N.D. Ill. 1997); *Marsh v. United States Dist. Ct.*, 1995 WL 23942 (N.D. Cal., Jan. 9, 1995); *Taylor v. Mendoza*, 1994 WL 698493 (N.D. Ill., Dec. 12, 1994)). Although one could say that such petitioners were at fault for failing to adhere to procedural rules, this Court held that such faults were not grave enough to disentitle petitioners to merits review, because "[t]o hold otherwise would mean that a dismissal of a first habeas petition for technical procedural reasons would bar the prisoner from ever obtaining review." *Martinez-Villareal*, 523 U.S. at 645.

It is thus clear from the evolution of filing restrictions that the only petitioners who may be denied merits review are those whose culpable fault is so grave as to constitute waiver or implicate state comity concerns. Even these individuals, however, are permitted merits review upon a showing of cause and prejudice. *See Murray*, 477 U.S. at

496; *Francis*, 425 U.S. at 542. Mr. Gonzalez was undoubtedly denied a review on the merits of his constitutional claims, but he followed all the applicable rules in filing his federal habeas petition. It was court error, not Mr. Gonzalez's default or waiver, which prevented the merits decision. Because Mr. Gonzalez did nothing wrong when he filed his first habeas petition, he not only engaged in less culpable conduct that those who procedurally default or abuse the writ, he also engaged in less culpable conduct than a person whose initial petition was dismissed for failure to exhaust or pay a filing fee. Thus, the Eleventh Circuit's interpretation of AEDPA as precluding a faultless 60(b) movant from obtaining a first merits review is a serious departure from the evolution of filing restrictions. *See Felker*, 518 U.S. at 664.

Consequently, the Suspension Clause's guarantee of one valid merits review, combined with the narrow circumstances in which that merits review can be denied, demonstrates that the Eleventh Circuit's construction of § 2244(b)(1) as precluding Rule 60(b) relief should be rejected because it raises grave constitutional concerns.

B.

Interpreting AEDPA as prohibiting Rule 60(b) relief raises grave concerns over denial of due process of law

The Eleventh Circuit's interpretation of AEDPA as preventing a state prisoner from invoking Rule 60(b) raises the serious risk of a Due Process violation in contravention of the Fifth Amendment to the United States Constitution. The statutory right of habeas corpus[15] is protected by the due process guarantees. *See Bonin v. Vasquez*, 999 F.2d 425, 430 (9th Cir. 1993) (holding that procedural due process applies in federal habeas proceedings); *see also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985) (holding that statutory rights involving life, liberty, or property are

[15] Arguably, the right to habeas corpus review is not merely statutory, but also stems from the Constitution's Suspension Clause.

subject to the Due Process Clause). Therefore, a state prisoner's petition for habeas relief must be resolved according to procedures that are fundamentally fair and specifically tailored to protect the prisoner from an erroneous deprivation of such right. *See e.g. Addington v. Texas*, 441 U.S. 418, 425 (1979) (holding that the "function of legal process is to minimize the risk of erroneous decisions"); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 161 (1951) (Frankfurter, J., concurring) (stating that "fairness of procedure is due process in its primary sense") (internal citations omitted).

In *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), this Court established that the process a litigant is due depends on a balancing of three factors: (1) the private interest affected by the official action; (2) the risk of erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirements would entail.

It is clear that, at a minimum, absent procedural default or waiver, a habeas petitioner has a statutory right to one valid review of the merits of his claims. *See Lonchar*, 517 U.S. 324, and discussion *supra*. Because merits review is at the heart of the statutory interest, the procedures established to govern habeas litigation must guarantee the petitioner a fair opportunity for at least one valid consideration of the merits of his claims. *See Anti-Fascist Comm.*, 341 U.S. at 161 (Frankfurter, J., concurring) (finding that "a state may not deprive a person of all existing remedies for the enforcement of a right . . . unless there is, or was, afforded to him some real opportunity to protect it").

Merits review cannot be protected, however, in the absence of a procedural mechanism to reopen a judgment in the extraordinary circumstance where court error has prevented merits review. *See Paterno v. Lyons*, 334 U.S. 314, 319 (1948) (finding that due process entails "an opportunity to effectively take advantage of . . . corrective remedies"); *Mooney v. Holohan*, 294 U.S. 103, 112-13

(1935) (finding that due process is violated when no "corrective judicial process" is available to challenge an erroneous court judgment). The absence of such a procedural mechanism results in the unfair and irremediable dismissal of claims for erroneous reasons having nothing to do with the underlying merits, even though the petitioner fully complied with procedural requirements. Consequently, precluding Rule 60(b) places habeas petitioners at great risk of erroneous deprivation of their statutory right to challenge illegal detentions.

Turning to the government's interest, while the state and society have a strong interest in the finality of criminal convictions, *see Murray*, 477 U.S. at 487, this does not mean that the federal government has an overriding interest in preserving erroneous federal habeas judgments. *See Calderon*, 523 U.S. at 557 (stating that government "can have little interest" in a faulty judgment). Moreover, because a Rule 60(b) motion does not seek to relitigate the substantive constitutional issues, it imposes minimal burdens on the district court and thus affects finality very little. *See Abdur'Rahman*, 537 U.S. at 598 (Stevens, J., dissenting from dismissal of writ of certiorari) (asserting that Rule 60(b) review only requires a court to determine whether a predicate for reopening judgment exists). In addition, the State's interest in comity and in ensuring that its procedural rules are not subverted by federal law, *see Murray*, 477 U.S. at 487, is not adversely affected by Rule 60(b) review. Rule 60(b) will not help a petitioner who has procedurally defaulted in state court; the rule in no way affects the state's ability to set procedure free from federal interference. Consequently, permitting a habeas litigant to make a motion under Rule 60(b) does not constitute an "additional" or "substitute" procedure that imposes an unreasonable administrative burden or cost on the state or federal government.

The Eleventh Circuit's narrow construction of Rule 60(b) does not strike the proper balance of interests because it eliminates the ability of habeas petitioners such as Mr. Gonzalez to challenge faulty district court decisions that prevent them from obtaining a merits review. The lower court's construction thus risks the erroneous deprivation of

the statutory right to challenge the legality of detention. When balanced against the government's *de minimus*, if not non-existent, interest in preserving defective district court judgments to minimally increase efficiency and finality, it becomes clear that denial of Rule 60(b) review falls well short of the process due to habeas litigants. Because the Eleventh Circuit's interpretation of AEDPA raises the specter of constitutional due process problems, it must be rejected.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Eleventh Circuit should be reversed.

Respectfully Submitted,

JOSHUA L. DRATEL
NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE
LAWYERS
14 Wall Street, 28th Floor
New York, New York
10005
(212) 732-0707

DAVID OSCAR MARKUS*
HIRSCH & MARKUS, LLP
9130 S. Dadeland Blvd.,
Suite 1200
Miami, Florida 33156
(305) 670-0077

Of counsel
M. AYA GRUBER
HOWARD M. WASSERMAN
KAREN PITA-LOOR
LILIAN APONTE-MIRANDA
PROFESSORS OF LAW,
FLORIDA INTERNATIONAL
UNIVERSITY
COLLEGE OF LAW
Miami, Florida 33199
(305) 348-8345

Counsel for Amicus Curiae
*counsel of record

Supreme Court, U.S.
FILED
FEB 25 2005
OFFICE OF THE CLERK

No. 04-6432

In The

Supreme Court Of The United States

Aurelio O. Gonzalez,

Petitioner,

v.

James V. Crosby, Jr.,
Secretary, Florida Department of Corrections

Respondent.

On Writ Of Certiorari To
The United States Court of Appeals
For The Eleventh Circuit

BRIEF OF THE OFFICE OF THE FEDERAL PUBLIC DEFENDER FOR THE MIDDLE DISTRICT OF TENNESSEE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Paul R. Bottei
Office Of The Federal Public Defender
Middle District of Tennessee
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047

Question Presented

Whether the court of appeals erred in holding that every Rule 60(b) motion (other than for fraud under (b)(3)) constitutes a prohibited 'second or successive petition' as a matter of law, in square conflict with decisions of this Court and of other circuits

TABLE OF CONTENTS

Question Presented i
Table Of Contents ii
Table Of Authorities iv
Statement Of Amicus vii
Summary of Argument 1

ARGUMENT 2

I. The District Court Has Authority To Grant Equitable Relief From An Unjust Judgment Given Its Inherent Authority Over Its Own Judgments Which Finds Expression Through Fed.R.Civ.P. 60(b), And Which Is Confirmed By 28 U.S.C. §2243 2

A. The District Court Has Inherent Authority Over Its Judgments Which Derives From Article III And Provides Authority To Ensure The Fundamental Justice Of Its Own Judgments 2

B. Fed.R.Civ.P. 60(b) Provides A Vehicle For The Exercise Of A District Court's Inherent Authority 4

C. 28 U.S.C. §2243 Also Confers Upon District Courts A Full Panoply Of Equitable Powers To Do Justice In Habeas Proceedings 5

D. Article III, Fed.R.Civ.P. 60(b), and 28 U.S.C. §2243 All Provide Ample Authority For Federal District Courts To Vacate Unjust Habeas Judgments 6

II. The Eleventh Circuit Has Erroneously Limited Relief From Judgment In Habeas Proceedings To Cases Involving Fraud 7

A. As A Logical Matter, Fraud Is Not The Only Basis For Reopening A Habeas Judgment Under Fed.R.Civ.P. 60(b) 8

B. The AEDPA Can Not And Does Not Limit Relief From Judgment To Cases Of Fraud . 9

1. The AEDPA Does Not By Its Terms Apply To A Motion For Relief Presenting Equitable Grounds For Relief From Judgment 9

2. The AEDPA Cannot And Does Not Constrain A District Court's Inherent Article III Judicial Powers Over Its Judgments 11

3. Given The Separation Of Powers And Principles Of Due Process, Application Of The AEDPA To A Motion For Relief From Judgment Would Be Unconstitutional 12

III. Gonzalez Has Stated Non-Frivolous Grounds For Relief From Judgment, Which Must Be Assessed By The District Court Under The Strictures Of Rule 60(b) 14

CONCLUSION 17

APPENDIX A-1

TABLE OF AUTHORITIES

CASES

In Re Abdur'Rahman,
392 F.3d 174 (6th Cir. 2004) 6, 9, 10, 16

Abdur'Rahman v. Bell, 537 U.S. 88 (2002) 16

Agostini v. Felton, 521 U.S. 203 (1997) 9, 15

Artuz v. Bennett, 531 U.S. 4 (2000) 15, 16

Bronson v. Schulten,
104 U.S. (14 Otto) 410 (1881) 2

Calderon v. Thompson, 523 U.S. 538 (1998) 10

Chambers v. Nasco, Inc., 501 U.S. 32 (1991) 11

City of Boerne v. Flores, 521 U.S. 507 (1997) 11

Cooper v. Oklahoma, 517 U.S. 348 (1996) 14

Darr v. Burford, 339 U.S. 200 (1950) 14

Fay v. Noia, 372 U.S. 391 (1963) 14

Gonzalez v. Secretary,
366 F.3d 1253 (11th Cir. 2004)(en banc) . . . 10, 12, 13, 15

Hecht Co. v. Bowles, 321 U.S. 321 (1944) 3

Klaprott v. United States, 335 U.S. 601 (1949) 4, 6, 15

Liljeberg v. Health Services Acquisition Corp.,
486 U.S. 847 (1988) 4, 14, 15

Marine Insurance Co. of Alexandria v. Hodgson,
11 U.S. (7 Cranch) 332 (1813) 3

Meredith v. Winter Haven, 320 U.S. 228 (1943) 3

Pierce v. Cook & Co.,
518 F.2d 720 (10th Cir.1975) 4

Plaut v. Spendthrift Farm, 514 U.S. 211 (1995) 4, 5, 13

Preiser v. Rodriguez, 411 U.S. 475 (1973) 5

Ritter v. Smith, 811 F.2d 1398 (11th Cir. 1987) 7, 9, 16

Radack v. Norwegian America Line Agency,
318 F.2d 538 (2d Cir. 1963) 4

Rodriguez v. Mitchell, 252 F.3d 191 (2d Cir. 2001) . . . 7, 14

Rodwell v. Pepe, 324 F.3d 66 (1st Cir. 2003) 10

Rufo v. Inmates of Suffolk Co. Jail,
502 U.S. 367 (1992) 15, 16

Storti v. Massachusetts, 183 U.S. 138 (1901) 6

United States v. Klein,
80 U.S. (13 Wall.) 128 (1872) 13

United States v. Ohio Power Co.,
353 U.S. 98 (1957)(per curiam) 2

United States v. Sioux Nation of Indians,
448 U.S. 371 (1980) 12, 13

Wingo v. Wedding, 418 U.S. 461 (1974) 6

CONSTITUTIONAL PROVISIONS STATUTES AND RULES

U.S.Const. Art. III ..... *passim*

28 U.S.C. §2243 ..... *passim*

28 U.S.C. §2244(b)(1) 10, 12, 13, 14

28 U.S.C. §2444(b)(2) 10

28 U.S.C. §2254 ..... 10, 13

Fed. R. Civ. P. 60(b) ..... *passim*

U.S. Rev. Stat. §761 (repealed) 5

OTHER SOURCES

Joseph Story, Commentaries On Equity Jurisprudence
As Administered In England And America
(Boston: Little, Brown & Co., 1918, W.H. Lyon, ed.) 2, 3

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The Office of the Federal Public Defender for the Middle District of Tennessee represents indigent petitioners in habeas corpus proceedings. It has had extensive experience in litigating motions for relief from judgment in habeas proceedings. Given that experience, the Office files this brief as *amicus curiae*.

The Office of the Federal Public Defender has received the written consent of both the Petitioner and Respondent to file its brief *amicus curiae* in this matter.

---

[1] No counsel for any party to this matter has authored any part of this brief. No other person or entity has made any monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Under Article III of the Constitution, a United States District Court has inherent equitable powers to grant relief from judgment. While those powers find expression through Fed.R.Civ.P. 60(b), in habeas cases, 28 U.S.C. §2243 also confers a full panoply of equitable powers. Given Article III, Rule 60(b) and 28 U.S.C. §2243, a District Court in a habeas proceeding has ample power to grant relief from judgment. Thus, as the Second Circuit held in *Rodriguez v. Mitchell*, a motion filed under Rule 60(b) which raises grounds for equitable relief is to be considered as such. It is not a second or successive claim for habeas corpus relief.

The Eleventh Circuit has erroneously concluded that fraud is the only basis for relief from a habeas judgment, believing this conclusion compelled by the Antiterrorism And Effective Death Penalty Act of 1996 (AEDPA).

This conclusion is flawed for numerous reasons. First, a federal judgment may be unjust for any number of reasons, not just fraud. Second, the AEDPA does not by its terms apply to a motion presenting grounds for equitable relief under Rule 60(b). Third, the AEDPA cannot and does not constrain a District Court's inherent Article III powers: the AEDPA cannot limit inherent Judicial powers, and Congress never repealed Rule 60(b) or 28 U.S.C. §2243 when passing the AEDPA. Fourth, application of 28 U.S.C. §2244(b)(1) to a motion for equitable relief is unconstitutional. It violates the Separation Of Powers and Due Process because it unconstitutionally prescribes the outcome of judicial proceedings, and it imposes a *res judicata* bar in habeas, a bar which offends fundamental principles deeply rooted in the history of the Nation.

Aurelio Gonzalez has presented non-frivolous grounds for equitable relief based on this Court's intervening decision in *Artuz v. Bennett*. Under Article III and Fed.R.Civ.P. 60(b), the District Court must weigh all the equities to determine whether the habeas judgment should be vacated. The judgment of the Eleventh Circuit should be reversed.

ARGUMENT

I. The District Court Has Authority To Grant Equitable Relief From An Unjust Judgment Given Its Inherent Authority Over Its Own Judgments Which Finds Expression Through Fed.R.Civ.P. 60(b), And Which Is Confirmed By 28 U.S.C. §2243

The District Court here has ample power to revisit or revise its judgment, authority which derives from Article III itself, Fed.R.Civ.P. 60(b), and 28 U.S.C. §2243.

A. The District Court Has Inherent Authority Over Its Judgments Which Derives From Article III And Provides Authority To Ensure The Fundamental Justice Of Its Own Judgments

In all cases, a United States District Court has equitable power to revisit and/or revise its own judgments in the interest of fundamental justice. As this Court has long recognized, this equitable power to grant such relief is "founded in the inherent power of the court over its own judgments." Bronson v. Schulten, 104 U.S. (14 Otto) 410, 417 (1881). That inherent power dates to the adoption of Article III itself, which extends federal jurisdiction to all matters of equity. See U.S.Const. Art. III §2. See also United States v. Ohio Power Co., 353 U.S. 98, 99 (1957)(per curiam)(acknowledging Supreme Court's "power over [its] own judgments.")

As Justice Story explained, the essence of the equitable powers conferred upon the District Courts is the power to ensure fundamental justice under the circumstances:

> [O]ne of the most striking and distinctive features of Courts of Equity is that they can adapt their decrees to *all the varieties of circumstances which may arise.*

Joseph Story, Commentaries On Equity Jurisprudence As Administered In England And America, §28, 14th ed. (Boston: Little, Brown & Co., 1918, W.H. Lyon, ed.) p. 24.

When asked to exercise its inherent equitable powers, a District Court has discretion to evaluate a situation in its entirety to reach a fundamentally just outcome:

> The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.

Hecht Co. v. Bowles, 321 U.S. 321, 329-330 (1944). Put another way, "An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity." Meredith v. Winter Haven, 320 U.S 228, 235 (1943).

Recognizing an Article III tribunal's broad equitable powers, Chief Justice John Marshall acknowledged that a court may grant relief from judgment where a new matter "clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself" before judgment. Marine Ins. Co. of Alexandria v. Hodgson, 11 U.S. (7 Cranch) 332, 336 (1813). He further emphasized that an Article III court can grant relief where the "equity of the applicant [is] free from doubt," and where a judgment "*would be against conscience for the person who has obtained it to avail himself.*" Id. at 337 (emphasis supplied).

B. Fed.R.Civ.P. 60(b) Provides A Vehicle For The Exercise Of A District Court's Inherent Authority

A District Court's Article III inherent powers over its judgments find expression through the vehicle of Fed.R.Civ.P. 60(b), first adopted in 1938. See Plaut v. Spendthrift Farm, 514 U.S. 211, 256 & n.8 (1995)(Stevens, J., dissenting). Rule 60(b) "does not provide a new remedy at all, but is simply the recitation of pre-existing judicial power." Plaut v. Spendthrift Farm, 514 U.S. at 234-235.

Rather, as this Court has made manifest, Rule 60(b) provides a vehicle by which a District Court may exercise its inherent power over its judgments. This Rule:

> merely reflects and confirms the courts' inherent and discretionary power 'firmly established in English practice long before the foundation of our Republic' to set aside a judgment *whose enforcement would work inequity*.

Plaut, 514 U.S. at 233-234 (emphasis supplied).

Like Article III itself, Rule 60(b) thus provides a "grand reservoir of equitable power to do justice in a particular case." Pierce v. Cook & Co., 518 F.2d 720, 722 (10th Cir. 1975)(en banc), quoting Radack v. Norwegian America Line Agency, Inc., 318 F.2d 538, 542 (2d Cir. 1963). Like Article III, Rule 60(b) "provides courts with authority 'adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.'" Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847 (1988). See also Klaprott v. United States, 335 U.S. 601 , 615 (1949)(Rule 60(b) vests power in courts adequate to enable them to vacate judgments whenever such action is "appropriate to accomplish justice.")

Fed.R.Civ.P. 60(b) establishes parameters for the exercise of such equitable powers. Rule 60(b)(1)-(5) enumerate

specific bases for granting equitable relief from judgment, including, for example: mistake or inadvertence (60(b)(1)); new evidence relevant to the federal judgment (60(b)(2)); fraud, misconduct, or misrepresentation (60(b)(3)); voidness of the judgment (60(b)(4)); and the judgment has been satisfied and/or ought not be enforced prospectively (60(b)(5)). Rule 60(b)(6) is itself "an encompassing reference to 'any other reason justifying relief from the operation of the judgment.'" Plaut, 514 U.S. at 256 (Stevens, J., dissenting).

In subsections (1)-(5), Rule 60(b) thus specifically identifies circumstances in which a judgment may be vacated in the interest of justice, while in subsection (6), the Rule allows District Courts to assess whether circumstances are extraordinary enough to warrant intervention and vacation of a previously-entered judgment.

C. 28 U.S.C. §2243 Also Confers Upon District Courts A Full Panoply Of Equitable Powers To Do Justice In Habeas Proceedings

In addition, in habeas proceedings, a District Court's equitable power over its judgments derives from 28 U.S.C. §2243, which instructs District Courts to decide habeas cases "as law and justice require." Explicit since 1874,[2] this command confirms that habeas courts are endowed with the full panoply of equitable powers necessary to ensure fundamental justice in a particular case. Under §2243:

> *All the freedom of equity procedure is thus prescribed*; and substantial justice, promptly administered, is ever the rule in habeas corpus.

---

[2] "Since 1874, the habeas corpus statute has directed the courts to determine the facts and dispose of the case summarily, 'as law and justice require.' Rev.Stat. §761, superseded by 28 U.S.C. §2243." Preiser v. Rodriguez, 411 U.S. 475, 487 (1973).

Storti v. Massachusetts, 183 U.S. 138, 143 (1901)(emphasis supplied).[3]

In habeas proceedings, therefore, 28 U.S.C. §2243 complements a District Court's inherent equitable powers over its judgment which find expression through Fed.R.Civ.P. 60(b). It allows a Court to revise a judgment, should equity so require.

D. Article III, Fed.R.Civ.P. 60(b), and 28 U.S.C. §2243 All Provide Ample Authority For Federal District Courts To Vacate Unjust Habeas Judgments

Taken together, the District Courts' inherent Article III powers over their own judgments, coupled with 28 U.S.C. §2243 and Fed.R.Civ.P. 60(b), provide District Courts a full panoply of powers to vacate a judgment in a habeas proceeding (as in other cases) when "appropriate to accomplish justice." Klaprott v. United States, 335 U.S. at 615.

Just as there may be unfairness in non-habeas cases warranting vacation of a judgment, when similar circumstances occur in a habeas proceeding, a District Court may intervene. This is true so long as a movant raises traditional grounds seeking relief from a federal judgment and does not merely raise a constitutional challenge to a state court conviction.

When a movant presents such traditional grounds for equitable relief, a District Court may exercise its inherent judicial powers to vacate a federal habeas judgment (either for the habeas petitioner *or* the state) when the circumstances are extraordinary enough to warrant relief. See In Re Abdur'Rahman, 392 F.3d 174 (6th Cir. 2004)(en banc)(granting relief from habeas judgment for habeas petitioner given

[3] Section 2243 is substantively identical to the 1874 version of Rev. Stat. §761 discussed in Storti. See Wingo v. Wedding, 418 U.S. 461, 468-469 (1974).

extraordinary circumstances); Ritter v. Smith, 811 F.2d 1398 (11th Cir. 1987)(granting relief from judgment for state in habeas proceedings given extraordinary circumstances).

Thus, as the Second Circuit has held: "A motion under Rule 60(b) to vacate a judgment is not a second or successive habeas petition and should therefore be treated as any other motion under Rule 60(b)." Rodriguez v. Mitchell, 252 F.3d 191, 198 (2d Cir. 2001). This conclusion is correct, given the inherent Article III powers of the District Courts.

II. The Eleventh Circuit Has Erroneously Limited Relief From Judgment In Habeas Proceedings To Cases Involving Fraud

Despite Article III, 28 U.S.C. §2243, and Fed.R.Civ.P. 60(b), the Eleventh Circuit has concluded that, when a habeas judgment is at issue, a District Court may exercise its inherent powers over such a judgment only when there has been fraud upon the court.

In reaching this conclusion, however, the Eleventh Circuit has fundamentally misapprehended the nature of an Article III court's inherent powers over its own judgments. By their very nature, those powers are not limited to cases of fraud.

Further, in creating this artificial limitation, the Eleventh Circuit has relied heavily on what it perceives to be limitations on those inherent powers established by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The AEDPA, however, has no such effect for numerous reasons: (1) By its terms, the AEDPA simply does not apply to Rule 60(b) motions; (2) The AEDPA did not – and does not – affect Article III, and it did not repeal either 28 U.S.C. §2243 or Fed.R.Civ.P. 60(b); and (3) Application of the AEDPA would violate the Separation of Powers and Due Process of Law.

A. As A Logical Matter, Fraud Is Not The Only Basis For Reopening A Habeas Judgment Under Fed.R.Civ.P. 60(b)

Because a judgment may be unfair for any number of reasons – including those explicitly contained in Rule 60(b) – the Eleventh Circuit has erred by concluding that fraud alone provides a basis for reopening a habeas judgment.

As a majority of the *en banc* Sixth Circuit has cogently explained, in habeas proceedings – as in any other federal proceeding – there is simply no logical basis for limiting relief from judgment to situations involving fraud:

> [There is no] reason for permitting Rule 60(b)(3) motions based on fraud while prohibiting motions brought pursuant to the other provisions enumerated in Rule 60(b). This is puzzling, because fraud is not the only reason to doubt the integrity of a habeas judgment. Rule 60(b)(1), for instance, states that a federal judgment may be reconsidered and vacated if it was based on 'mistake, inadvertence, or excusable neglect.' As the Second Circuit noted, the integrity of a habeas judgment might be called into doubt pursuant to Rule 60(b)(1) where the respondent engaged in unfair surprise by failing to notify the petitioner of the witnesses it planned to call in the habeas hearing [citation omitted]. The dissent in our case offers no reason why fraud on the court would be a valid basis for a Rule 60(b)(3) motion, while such a claim of unfair surprise, filed as a Rule 60(b)(1) motion, would have to be characterized as a second or successive habeas petition. . . . Accordingly, it makes sense to treat both motions pursuant to Rule 60(b).

In Re Abdur'Rahman, 392 F.3d at 180.

That being said, the Eleventh Circuit's attempt to limit relief from judgment to cases of fraud is insupportable as a matter of logic. It also fails to comport with the historical practice of the federal courts, which have granted relief from judgment even when fraud was not at issue. See e.g., Agostini v. Felton, 521 U.S. 203 (1997). On this basis alone, the Eleventh Circuit's conclusion is erroneous.[4]

B. The AEDPA Can Not And Does Not Limit Relief From Judgment To Cases Of Fraud

When limiting relief from judgment in habeas proceedings to cases of fraud, the Eleventh Circuit believed that its result was somehow compelled by the AEDPA. This conclusion is fatally flawed for numerous reasons, given the District Court's inherent Article III powers, which find expression through Rule 60(b).[5]

1. The AEDPA Does Not By Its Terms Apply To A Motion For Relief Presenting Equitable Grounds For Relief From Judgment

First, the AEDPA by its terms does not apply to a motion for relief from judgment seeking to reopen proceedings

---

[4] Were the Eleventh Circuit correct, it would also mean that the state could never seek relief from judgment in a habeas proceeding absent proof of fraud by the petitioner. If that were true, then the Eleventh Circuit's granting the state relief from judgment in Ritter v. Smith, 811 F.2d 1398 (11th Cir. 1987) was illegal, as there was no fraud. The execution of Ritter based on that modified federal judgment would also have been illegal.

[5] A chart summarizing the relationship of Article III, 28 U.S.C. §2243, Rule 60(b) and the AEDPA is attached as an appendix to this brief.

under Fed.R.Civ.P. 60(b), when that motion presents traditional equitable grounds seeking relief from judgment.

The AEDPA's provisions only pertain to habeas claims 'presented in a second or successive habeas corpus application under section 2254." See 28 U.S.C. §2244(b)(1) & (b)(2). Section 2244 is thus inapplicable to a motion which is filed under either Article III or Rule 60(b), and which raises *grounds for equitable relief*, i.e., reasons demonstrating unfairness in a previously-entered federal judgment. See Calderon v. Thompson, 523 U.S. 538 (1998)(§2244 inapplicable by its terms to *sua sponte* recall of mandate).

Here, Gonzalez has raised grounds for equitable relief, which do not involve any "direct challenge" to the constitutionality of his state conviction. See e.g., In Re Abdur'Rahman, 392 F.3d at 181; Rodwell v. Pepe, 324 F.3d 66, 70 (1st Cir. 2003). Gonzalez is merely asking to reopen federal proceedings based on an intervening federal decision concerning federal procedural law. He is not directly requesting vacation of a state court judgment or sentence.

Thus, the AEDPA does not by its terms apply to Gonzalez's request for relief, because he is not making a claim for habeas corpus relief. The AEDPA therefore does not limit his ability to seek the relief he requests.[6]

---

[6] The Eleventh Circuit also erroneously believed that there is no functional difference between a motion to recall an appellate mandate and a motion for relief from judgment. That is not true. There is a significant distinction: When a District Court acts on a motion for relief from judgment, it acts upon its own judgment and considers whether to reopen or revise that judgment. On the other hand, when an appellate court recalls a mandate, the District Court judgment remains intact. A District Court considering its own judgment is exercising its inherent Article III authority over its own judgment, a power which an appellate court does not have. The Eleventh Circuit properly recognized that a District Court has broader discretion to reopen its own judgment than an appellate court does to recall a mandate. See Gonzalez v. Secretary, 366 F.3d 1253, 1276 (11th Cir. 2004)(en banc).

2. The AEDPA Cannot And Does Not Constrain A District Court's Inherent Article III Judicial Powers Over Its Judgments

Second, even while the AEDPA does not apply by its terms to the situation here, the AEDPA does not constrain a District Court's inherent equitable powers. It cannot do so as a constitutional matter, and the AEDPA has not done so as a practical matter. Indeed, when passing the AEDPA, Congress simply did not repeal either Article III, 28 U.S.C. §2243, or Fed.R.Civ.P. 60(b) – all of which provide a District Court equitable power to grant relief from judgment.

It goes without saying that Congress cannot, by ordinary legislation, override a provision of the Constitution. See e.g., City of Boerne v. Flores, 521 U.S. 507, 529 (1997) (Constitution is paramount superior law, unchangeable by ordinary legislative means). Consequently, it is obvious that Congress did not somehow repeal District Courts' inherent Article III equitable powers when it passed the AEDPA.

And where Fed.R.Civ.P. 60(b) is merely a vehicle for the expression of those Article III powers, Congress is (and was) powerless to repeal those powers as well. Even if Congress sought to eliminate Rule 60(b) as a vehicle for the expression of inherent Article III powers, the Judiciary could still exercise those inherent powers, with or without Rule 60(b).

Even so, "[W]e do not lightly assume that Congress has intended" to abolish either Rule 60(b) or the then 122-year-old §2243 in habeas proceedings when it passed the AEDPA. See Chambers v. Nasco, Inc., 501 U.S. 32, 47 (1991). This is especially true where Congress was aware of those provisions and did nothing to explicitly repeal them. Under the circumstances, it cannot be said that the AEDPA somehow repealed, *sub silentio*, Rule 60(b) in habeas proceedings.

In fact, were that true, Congress would have thereby sought to create an anomalous result: Article III equitable powers would remain fully viable in every case, except those involving habeas proceedings. Yet for that to be true, one would have to assume that Congress, without saying so, implicitly repealed Article III powers in a specific subset of federal cases. Quite apart from Congress' constitutional inability to do so, Congress never actually did so, or even attempted to do so.

Notwithstanding Congress' inability to repeal Article III inherent powers, and Congress' stark silence about repealing §2243 or Rule 60(b) in habeas proceedings, the Eleventh Circuit reasoned that Rule 60(b) had to give way to the AEDPA, because the AEDPA is a statute, while 60(b) is a "rule." See Gonzalez v. Secretary, 366 F.3d 1253, 1269-1270 (11th Cir. 2004)(en banc). This analysis, however, fundamentally misapprehends the issue.

The proper inquiry is not whether the AEDPA trumps a "rule," but whether Article III powers and their vehicle – Rule 60(b) – trump the AEDPA. The answer is obvious: Article III inherent powers which find expression in Rule 60(b) trump the AEDPA.

3. Given The Separation Of Powers And Principles Of Due Process, Application Of The AEDPA To A Motion For Relief From Judgment Would Be Unconstitutional

Third, while the AEDPA doesn't apply and didn't repeal the District Court's powers, the provisions of the AEDPA (specifically 28 U.S.C. §2244(b)(1)) cannot constitutionally be applied here for at least two reasons:

a. It violates Article III and the Separation of Powers for Congress to "prescribe[] a rule of decision in a case

pending before the courts." United States v. Sioux Nation of Indians, 448 U.S. 371, 404 (1980); United States v. Klein, 80 U.S. (13 Wall.) 128 (1872).

In *Klein*, for example, this Court struck down the Act of July 12, 1870, ch. 251, by which Congress purported to order the courts to dismiss certain appeals: "We are directed to dismiss the appeal, if we find that the judgment must be affirmed." Klein, 80 U.S. (13 Wall.) at 146-147. Striking down Congress' mandate of dismissal (a judicial prerogative) as violating the Separation of Powers, Chief Justice Chase explained: "Can we [dismiss the appeal] without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it?" Id.

Exactly like the unconstitutional statute in *Klein*, through §2244(b)(1) Congress has sought to dictate the outcome of a judicial proceeding by describing the judicial act which courts must undertake: Dismissal of a claim. As in *Klein*, Congress lacks that Judicial Power. Congress cannot tell the Judiciary how to decide a case. It simply cannot dictate the ultimate outcome an Article III proceeding. That, however, is the effect of §2244(b)(1). As in Klein, therefore, §2244(b)(1) is unconstitutional. See Plaut v. Spendthrift Farm, 514 U.S. at 225 (Congress cannot "direct[] what particular steps shall be taken in the progress of a judicial inquiry.")

b. In addition, Section 2244(b)(1) violates Due Process of Law because it purports to impose – for the first time in the history of the Nation – an absolute *res judicata* bar on habeas claims raised in a second §2254 petition. In fact, the Eleventh Circuit correctly notes that §2244(b)(1) purports to establish a "total ban" on federal court review of habeas claims raised in a prior habeas petition. Gonzalez, 366 F.3d at 1269. Such a "total ban," however, is unconstitutional.

Since the writ of habeas corpus was first employed in

1305,[7] "All the authorities agree that *res judicata* does not apply to applications for habeas corpus." Darr v. Burford, 339 U.S. 200, 214-215 (1950). This is so, because "The courts *must be kept open to guard against injustice through judicial error.*" Id. (emphasis supplied).

Because §2244(b)(1) purports to impose an absolute *res judicata* bar to situations involving habeas claims presented in a first habeas proceeding, it violates Due Process: It "offends a principle of justice that is deeply rooted in the traditions and conscience of our people." Cooper v. Oklahoma, 517 U.S. 348, 362 (1996).

Consequently, given the Separation Of Powers and Due Process, 28 U.S.C. §2244(b)(1) cannot, and does not, prohibit relief from judgment in this case.

III. Gonzalez Has Stated Non-Frivolous Grounds For Relief From Judgment, Which Must Be Assessed By The District Court Under The Strictures Of Rule 60(b)

Because Article III and Fed.R.Civ.P 60(b) confer and express inherent judicial powers, and because the AEDPA can not and did not affect those judicial powers, Fed.R.Civ.P. 60(b) remains fully viable in habeas proceedings. See Rodriguez v. Mitchell, 252 F.3d at 191.

Even in habeas cases, however, relief from judgment remains subject to the strictures governing such relief contained in Rule 60(b), which by its nature limits the availability of relief from judgment in habeas proceedings. In particular, "Rule 60(b)(6) relief is . . . neither categorically available nor categorically unavailable," but applies where "the basis for relief . . . is extraordinary." Liljeberg v. Health

[7] This first known instance of the use of the writ was in 1305, the "thirty-third year of Edward I." Fay v. Noia, 372 U.S. 391, 400, 83 S.Ct. 822, 828 (1963).

Services Acquisition Corp., 486 U.S. at 863, 864 & n. 11 (1988); Klaprott v. United States, 335 U.S. 601 (1949). This requires a case-specific inquiry. See e.g., Liljeberg, 486 U.S. at 864-870 (outlining factors governing consideration of 60(b) motion, and granting relief under 60(b)(6) for violation of 21 U.S.C. §455(a) which came to light after judgment).

When a habeas judgment is at issue, therefore, a District Court must carefully examine the equities of the situation to determine whether a judgment denying (or granting) habeas relief is fundamentally just under the circumstances. Compare Rufo v. Inmates of Suffolk Co. Jail, 502 U.S. 367, 393 (1992) (O'Connor, J., concurring)(decisions whether to grant relief under Rule 60(b)(5) are "complex decisions requiring the sensitive balancing of a host of factors.")

In his motion, Gonzalez has stated non-frivolous grounds for equitable relief which fit within the traditional framework of Rule 60(b). Therefore, the District Court must properly weigh all the equities to determine whether it is appropriate to reopen the judgment denying habeas relief and to conduct further proceedings.

In doing so, the District Court must first consider this Court's intervening decision in Artuz v. Bennett, 531 U.S. 4 (2000). As Judge Tjoflat has properly recognized:

> Rule 60(b) is the perfect vehicle for invoking the intervening-change-in-the-law exception to the mandate rule [citation omitted]. In fact, I can think of no procedural rule that is as tailor made for this situation as Rule 60(b)(6).

Gonzalez, 366 F.3d at 1309 (Tjoflat, J., concurring and dissenting). When considering *Artuz*, however, the District Court must consider the fact that "[i]ntervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6)." Agostini v. Felton, 521 U.S. at 239.

Yet while *Artuz* is the starting point for the District

Court's analysis, the District Court must also "balanc[e] . . . a host of [other] factors" to determine whether relief from judgment is appropriate. Rufo v. Inmates of Suffolk Co. Jail, 502 U.S. at 393 (O'Connor, J., concurring).

Thus, the District Court may be required to consider any number of different factors, including, for example: the fairness of Gonzalez's having been denied a hearing on the merits of his habeas petition;[8] the timing of the motion;[9] and whether state and federal policy are being served or disserved by continued enforcement of the prior federal habeas judgment.[10]

While some might complain about allowing Article III courts to exercise their Article III powers over their judgments in habeas proceedings, the plain fact is that to obtain relief from judgment – whether in a habeas case or a non-habeas case – a movant often faces a real burden.

Nevertheless, as in all federal cases, a District Court faced with a motion for relief from judgment can inquire into the equities to determine whether its judgment is fundamentally fair and/or whether a movant has made a sufficient showing to inquire further.

On the facts here, Gonzalez has made a threshold showing that the District Court judgment denying habeas relief is inequitable and should be reconsidered or revised in light of *Artuz*. Because the motion presents grounds for equitable relief specifically contemplated by Rule 60(b), the District Court must be allowed to consider his motion. And, as it would in any non-habeas case, the District Court may properly consider all the equities to determine whether the judgment dismissing Gonzalez's habeas petition should remain intact, reconsidered, or modified in light of all the equities.

CONCLUSION

In light of Article III, 28 U.S.C. §2243, Fed.R.Civ.P. 60(b), given the inapplicability and/or unconstitutionality of the AEPDA, and given this Court's intervening decision in *Artuz*, this Court should hold that the District Court may consider Gonzalez's motion for relief from judgment. This Court should reverse the judgment of the Eleventh Circuit and remand for further proceedings.

Respectfully Submitted,

Paul R. Bottei
Office Of The Federal Public Defender
Middle District of Tennessee
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047

February 25, 2005

---

[8] See e.g., Abdur'Rahman v. Bell, 537 U.S. 88, 90 (2002)(Stevens, J., dissenting)(petitioner denied hearing on his substantive constitutional claim because of erroneous application of procedural bar).

[9] See In Re Abdur'Rahman, 392 F.3d 174, 185 (6th Cir. 2004)(en banc)(60(b) movant filed motion for relief from judgment soon after promulgation of intervening state court rule and therefore acted reasonably).

[10] See In Re Abdur'Rahman, 392 F.3d at 187 (relief from judgment warranted where neither State of Tennessee, federal court, nor petitioner has any interest in execution of federal judgment now shown to be wrong); Ritter v. Smith, 811 F.2d 1398 (11th Cir. 1987)(granting state relief from judgment in habeas case based on equities).

EQUITABLE RELIEF FROM JUDGMENT IN HABEAS PROCEEDINGS

ARTICLE III §2:
Source Of Inherent Equitable Power
To Grant Relief From Judgment

28 U.S.C. §2243:
"As Law And Justice Require":
Since 1874, Confirms District Court's Full Panoply
Of Equitable Powers In Habeas Proceedings

Fed.R.Civ.P. 60(b):
Not A Remedy In Itself:
A Vehicle For Exercise Of Inherent Article III Powers

vs.

AEDPA, 28 U.S.C. §2244
Does Not Apply By Its Terms To Traditional Grounds
For Equitable Relief From Judgment;
Cannot Abrogate Article III Powers;
Does Not Override Or Repeal 28 U.S.C. §2243;
In Habeas Proceedings, Does Not Abrogate 60(b);
§2244(b)(1) Violates Separation Of Powers;
§2244(b)(1) Violates Due Process

No. 04-6432

In the Supreme Court of the United States

AURELIO O. GONZALEZ,

Petitioner,

v.

JAMES V. CROSBY, JR., Secretary for the Department of Correction,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE STATES OF TENNESSEE, ALABAMA, ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, KENTUCKY, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH DAKOTA, TEXAS, UTAH, VIRGINIA, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

PAUL G. SUMMERS
Attorney General and Reporter
State of Tennessee
MICHAEL E. MOORE
Solicitor General
JOSEPH F. WHALEN*
Associate Solicitor General
425 Fifth Avenue North
Nashville, TN 37243
(615) 741-3499
* *Counsel of Record* *Counsel for Amici Curiae*
[Additional counsel listed on inside front cover]

Becker Gallagher Legal Publishing, Inc. 800.890.5001

TROY KING
Attorney General of Alabama

TERRY GODDARD
Attorney General of Arizona

MIKE BEEBE
Attorney General of Arkansas

JOHN W. SUTHERS
Attorney General of Colorado

M. JANE BRADY
Attorney General of Delaware

CHRISTOPHER L. MORANO
Chief State's Attorney of Connecticut

THURBERT E. BAKER
Attorney General of Georgia

MARK J. BENNETT
Attorney General of Hawaii

LAWRENCE G. WASDEN
Attorney General of Idaho

LISA MADIGAN
Attorney General of Illinois

STEVE CARTER
Attorney General of Indiana

GREGORY D. STUMBO
Attorney General of Kentucky

JIM HOOD
Attorney General of Mississippi

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri

MIKE MCGRATH
Attorney General of Montana

JON BRUNING
Attorney General of Nebraska

BRIAN SANDOVAL
Attorney General of Nevada

JIM PETRO
Attorney General of Ohio

W.A. DREW EDMONDSON
Attorney General of Oklahoma

THOMAS W. CORBETT, JR.
Attorney General of Pennsylvania

LAWRENCE E. LONG
Attorney General of South Dakota

GREG ABBOTT
Attorney General of Texas

MARK L. SHURTLEFF
Attorney General of Utah

JUDITH WILLIAMS JAGDMANN
Attorney General of Virginia

PATRICK J. CRANK
Attorney General of Wyoming

QUESTION PRESENTED

Whether the court of appeals erred in holding that every Rule 60(b) motion (other than for fraud under (b)(3)) constitutes a prohibited "second or successive" petition as a matter of law.

TABLE OF CONTENTS

Question Presented i

Table of Contents ii

Table of Authorities iv

Interest of *Amici Curiae* 1

Statement of the Case 1

Summary of the Argument 3

Argument 4

I. CAPITAL HABEAS PETITIONERS USE RULE 60(B) TO CIRCUMVENT THE RESTRICTIONS AGAINST SUCCESSIVE HABEAS LITIGATION IN 28 U.S.C. § 2244(b) 5

A. After the Conclusion of Habeas Proceedings, The Sole Interest of Capital Habeas Petitioners Is In Litigation for Litigation's Sake and the Delay That It Engenders 5

B. Recent Experience In Tennessee Shows How Capital Habeas Petitioners Can Use Rule 60(b) to Thwart AEDPA's Restrictions on Successive Habeas Litigation and Debase the State's Interest in Finality 9

II. MOTIONS FILED UNDER RULE 60(B) THAT SEEK TO REVISIT THE MERITS OF THE UNDERLYING FEDERAL HABEAS JUDGMENT SHOULD BE REGARDED AS SECOND OR SUCCESSIVE PETITIONS 19

A. This Court Endorsed the Proper Rule In *Calderon v. Thompson* 19

B. The "Functional Approach" Touted By Petitioner and His *Amici* Is Fundamentally Flawed 21

Conclusion 29

TABLE OF AUTHORITIES

Cases

Abdur'Rahman v. Bell, No. 96-cv-380 (M.D.Tenn.) . . . 11

Abdur'Rahman v. Bell, 534 U.S. 970 (2001) 11

Abdur'Rahman v. Bell, 535 U.S. 981 (2002) 11

Abdur'Rahman v. Bell, 535 U.S. 1016 (2002) 12

Abdur'Rahman v. Bell, 537 U.S. 88 (2002) 12

Abdur'Rahman v. Bell, 332 F.3d 960 (6th Cir. 2003) . . 12

In re Abdur'Rahman, 392 F.3d 174 (6th Cir. 2004), *petition for cert. filed* (No. 04-1247) (Mar. 11, 2005) 8, 12, 21-24

Adams v. Holland, 330 F.3d 398 (6th Cir. 2003), *cert. denied*, 541 U.S. 956 (2004) 15

State v. Alley, No. M1991-00019-SC-DPE-DD (Tenn.) 17

Alley v. Bell, No. 97-3159 (W.D.Tenn.) 16, 17

Alley v. Bell, 540 U.S. 839 (2003) 16

Alley v. Bell, 392 F.3d 822 (6th Cir. 2004) 8, 16, 17, 21-22

Banks v. Dretke, 540 U.S. 668 (2004) 18

Baze v. Haeberlin, No. 01-cv-31 (E.D. Ky.) 8

Bell v. Thompson, *cert. granted* (No. 04-514) (Jan. 7, 2005) 9

Bowling v. Haeberlin, No. 99-cv-236 (E.D.Ky.) *8*

Brown v. Head, 349 F.3d 1291 (11th Cir. 2003) 8

Burris v. Parke, 130 F.3d 782 (7th Cir. 1997) 6, 20

Calderon v. Thompson, 523 U.S. 538 (1998) . . . . *passim*

Clayton v. Ward, No. 4:96-cv-173 (N.D.Okla.) 8

Cone v. Bell, 359 F.3d 785 (6th Cir. 2004), *rev'd, Bell v. Cone*, 125 S.Ct. 847 (2005) . 14, 16, 18

Corey v. Bradshaw, No. 5:96-cv-797 (N.D.Ohio) 8

Davis v. Mitchell, 318 F.3d 682 (6th Cir. 2003), *cert. denied*, 124 S.Ct. 2902 (2004) 13, 15, 18

Dunlap v. Litscher, 301 F.3d 873 (7th Cir. 2002) 22

Evans v. Smith, 220 F.3d 306 (4th Cir. 2000) 8

Gonzalez v. Crosby, 125 S.Ct. 961 (2005) 3

Hamilton v. Newland, 374 F.3d 822 (9th Cir. 2004), *cert. denied*, __ S.Ct. __, 2005 WL 517049 (Mar. 7, 2005) 24

Hanover Ins. Co. v. United States, 880 F.2d 1503 (1st Cir. 1989) 10

Harper v. Vaughn,
272 F.Supp.2d 527 (E.D.Pa. 2003) 23

Hazel-Atlas Glass Co. v. Hartford-Empire Co.,
322 U.S. 238 (1944) 10, 19

Herrera v. Collins, 506 U.S. 390 (1993) 5

Hutchison v. Bell, No. 3:98-cv-664 (E.D.Tenn.) . . . 8, 15

Hutchison v. Bell, 539 U.S. 944 (2003) 14

Johnson v. Bell, No. 2:97-cv-3052 (W.D. Tenn.) . . 8, 18

Johnson v. Bell, No. 04-6361 (6th Cir.) 18

Johnson v. Bell, 541 U.S. 1010 (2004) 17

Jones v. Roper, 311 F.3d 923 (8th Cir. 2002) 8

Lambrix v. Singletary, 520 U.S. 518 (1997) 28

Mayle v. Felix, 125 S.Ct. 824 (2005) 27

In re Medina, 109 F.3d 1556 (11th Cir. 1997) 6, 8

McCleskey v. Zant, 499 U.S. 467 (1991) 5

Mobley v. Head, 306 F.3d 1096 (11th Cir. 2002) 8

Murray v. Greiner, 394 F.3d 78 (2d Cir. 2005) 26

Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995) . . 26

Rodwell v. Pepe, 324 F.3d 66 (1st Cir.),
cert. denied, 540 U.S. 873 (2003) . . 6, 21, 22, 24, 28

Slack v. McDaniel, 529 U.S. 473 (2000) 26

Smith v. Anderson, __ F.3d __,
2005 WL 517525 (6th Cir. Mar. 6, 2005),
cert. denied, __ S.Ct. __, 2005 WL 520024
(Mar. 7, 2005) 8, 21

State v. Carter, 114 S.W.3d 895 (Tenn. 2003),
cert. denied, 540 U.S. 1221 (2004) 16

Smith v. Murray, 477 U.S. 527 (1986) 28

State v. Workman,
111 S.W.3d 10 (Tenn.Crim.App. 2002) 13

Stewart v. Martinez-Villareal,
523 U.S. 637 (1998) 6, 26

Thompson v. Calderon,
151 F.3d 918 (9th Cir. 1998) 22

United States v. Beggerly, 524 U.S. 38 (1998) 10

United States v. Winestock, 340 F.3d 200 (4th Cir.),
cert. denied, 540 U.S. 995 (2003) 21, 22, 23

Wiggins v. Smith, 539 U.S. 510 (2003) 13

Workman v. Bell, No. 2:94-cv-2577 (W.D.Tenn.) 8

Workman v. Bell, 178 F.3d 759 (6th Cir. 1998) 12

Workman v. Bell, 209 F.3d 940 (6th Cir. 2000) 12

Workman v. Bell, 227 F.3d 331 (6th Cir. 2000) 7

Workman v. Bell, 245 F.3d 849 (6th Cir. 2001) 10

Workman v. State, 41 S.W.3d 100 (Tenn. 2001) 13

Workman v. Bell, Nos. 04-6037/6038 (6th Cir.) 14

Zuern v. Tate, No. 1:92-cv-771 (S.D.Ohio) 8

Statutes and Rules

28 U.S.C. § 2244(b)(1996) 25
28 U.S.C. § 2244(b) . . . . . *passim*
28 U.S.C. § 2244(b)(1) 3, 7, 19, 24
28 U.S.C. § 2244(b)(2) 7, 19
28 U.S.C. § 2244(d) 1
28 U.S.C. § 2253 . . . . . 2, 26
Fed. R. App. P. 41(d)(2)(D) 10
Fed. R. Civ. P. 60(a) 19
Fed. R. Civ. P. 60(b) . . . . . *passim*
Tenn. Sup. Ct. R. 39 . . . . . 11, 15

Other Authorities

141 Cong. Rec. S7803-01, 7877
(daily ed. June 7, 1995) 4

Joint Explanatory Statement of the Committee of
Conference, H.Conf.Rep. No. 104-518,
reprinted in 1996 U.S.C.C.A.N. 944 4

Peter Hack, *The Roads Less Traveled: Post Conviction Relief Alternatives and the Antiterrorism and Effective Death Penalty Act of 1996*,
30 Am.J.Crim.L. 171 (2003) 7

Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Litigation*, 77 N.Y.U.L.Rev. 699 (2002) . . . 7

U.S. Dep't of Justice, Office of Justice Programs, *Federal Habeas Corpus Review, Challenging State Court Criminal Convictions* 17 (1995) 27

INTEREST OF *AMICI CURIAE*

In this case, the Court will address the question whether, or to what extent, a habeas petitioner may utilize Rule 60(b), Fed.R.Civ.P., in light of the restrictions against successive habeas litigation set forth in 28 U.S.C. § 2244(b), as amended by AEDPA. *Amici curiae*, as their states' chief law enforcement officers and defenders and enforcers of the judgments of their respective state courts, have a particular interest in the correct interpretation and application of AEDPA and, specifically, its restrictions against the filing of second or successive habeas petitions. That interest extends to ensuring that habeas petitioners, particularly capital habeas petitioners, are not allowed to circumvent those restrictions by resorting to a misuse of Rule 60(b).

STATEMENT OF THE CASE

Petitioner, Aurelio O. Gonzalez, a Florida prisoner, filed a petition for a writ of habeas corpus on June 23, 1997, challenging his 1982 convictions for robbery with a firearm, armed burglary, and armed kidnapping. J.A. 1 (R.1) He filed an amended petition on November 12, 1997, adding a claim challenging his sentence. J.A. 2 (R.10) Respondent asserted in response that the claims presented were barred by the one-year statute of limitations, 28 U.S.C. § 2244(d), and were procedurally defaulted. J.A. 2 (R.4, 12) On September 9, 1998, the district court dismissed the petition as time-barred. J.A. 3 (R.17)

Petitioner filed a notice of appeal, and though the district court had issued a certificate of appealability without elaboration, J.A. 4 (R.23), the appeal was dismissed without prejudice on October 28, 1999, and petitioner's application for a certificate of appealability was remanded to the district

court for a specific determination of which issues merited appeal under 28 U.S.C. § 2253. J.A.4 (R.25) Petitioner thereafter filed a new application for a certificate of appealability in the district court, which was denied on December 10, 1999. J.A. 4 (R.27) Petitioner filed a new notice of appeal, which the court of appeals treated as an application for a certificate of appealability and dismissed on April 6, 2000. J.A. 5 (R.32) Petitioner thereafter sought to file a petition to rehear the court of appeals' denial of a certificate of appealability in the original appeal, but that petition was returned unfiled on April 26, 2000.

On August 2, 2001, petitioner filed a motion under Fed.R.Civ.P. 60(b) in the district court, alleging, on the basis of intervening appellate decisions, that the district court had erred in dismissing his habeas petition as time-barred. J.A. 5 (R.33), 13 The district court denied the motion on March 5, 2002, J.A. 5 (R.34), 21, and denied a certificate of appealability on May 14, 2002. J.A. 6 (R.38) On August 15, 2002, a single judge of the court of appeals granted a certificate of appealability on the issue whether the district court had erred in dismissing the habeas petition as time-barred. J.A. 9 On January 10, 2003, however, a panel of the court of appeals quashed the certificate of appealability as improvidently granted and dismissed the appeal. J.A. 10

On April 1, 2003, the en banc court of appeals granted rehearing and consolidated petitioner's case with two others. J.A. 10 In an opinion issued on April 26, 2004, the en banc majority determined that petitioner's 60(b) motion was "attacking the merits of [the district court's] decision — the term merits referring to the correctness of the decision itself even though the ground of this particular decision was the statute of limitations." J.A. 69 Applying this Court's decision in *Calderon v. Thompson*, 523 U.S. 538 (1998), the court

held that petitioner's 60(b) motion was properly dismissed because it was "an attempt to relitigate a claim that has already been presented in a prior application and rejected, which means it must be dismissed under [28 U.S.C.] § 2244(b)(1)." J.A. 69 This Court granted certiorari to review that decision on January 14, 2005. *Gonzalez v. Crosby*, 125 S.Ct. 961 (2005).

SUMMARY OF THE ARGUMENT

AEDPA's restrictions against successive habeas litigation were enacted for the express purpose of addressing the problem of unnecessary and abusive delays in capital cases. But habeas petitioners, capital and non-capital alike, have sought to circumvent these restrictions by resorting to the use of Rule 60(b), Fed.R.Civ.P. The problem is particularly acute in capital cases, given the purpose and intent of AEDPA. The reality in such cases is that, after federal habeas proceedings have concluded, the interest of capital prisoners is in delay — an interest that led to the abuse of the writ that Congress sought to curb with AEDPA, and an interest that has led to the use of 60(b) in order to avoid what Congress has done. Recent experience in one state illustrates how 60(b) motions can be, and are being, used in capital cases not only to thwart AEDPA's restrictions against successive habeas litigation but also effectively to derail a state's efforts to protect its interest in finality and execute its lawful judgments.

In order to effectuate AEDPA's restrictions against successive habeas litigation, this Court should adhere to the rule it endorsed in *Calderon v. Thompson*, 523 U.S. 538 (1998), and hold that a Rule 60(b) motion that seeks to revisit the merits of a prior judgment denying habeas relief must be regarded as a second or successive petition. The "functional

approach" adopted by some lower courts is unfaithful to *Calderon* and is fundamentally flawed. It fails to account for an entire category of potential 60(b) motions and, thus, distinguishes between 60(b) motions that seek to revisit the merits of a prior final judgment depending upon the basis for that judgment, which is legally unsupportable. This flaw is significant. It effectively allows any capital or non-capital habeas petitioner a grand opportunity to engage in postjudgment, successive habeas litigation by merely assembling a new argument for why the prior judgment was incorrect.

ARGUMENT

This case calls upon the Court to decide whether, or to what extent, a habeas petitioner may utilize Rule 60(b), Fed.R.Civ.P., in light of the restrictions against successive habeas litigation set forth in 28 U.S.C. § 2244(b), as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA). How the Court resolves this issue has broad ramifications for all habeas cases, but its decision can be expected to have the most significant impact on capital habeas cases. Indeed, AEDPA was enacted precisely "to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases . . . ." Joint Explanatory Statement of the Committee of Conference, H.Conf.Rep. No. 104-518, at 111, *reprinted in* 1996 U.S.C.C.A.N. 944.[1] Although the case before the

[1] *See also* 141 Cong. Rec. S7803-01, 7877 (daily ed. June 7, 1995) (statement of Sen. Dole) (passage of bill that would become AEDPA "will go a long, long way to streamline the lengthy appeals process" in capital cases "[b]y imposing filing deadlines . . . and by limiting condemned killers . . . to one Federal habeas petition").

Court is not a capital case, it is the objective of this *amici curiae* brief to provide this Court with a perspective concerning how Rule 60(b) motions are being used, indeed abused, in capital cases and to show why it is essential that this Court adhere to a strict rule prohibiting a habeas petitioner's resort to Rule 60(b) to evade AEDPA's restrictions against successive habeas litigation.

I. CAPITAL HABEAS PETITIONERS USE RULE 60(B) TO CIRCUMVENT THE RESTRICTIONS AGAINST SUCCESSIVE HABEAS LITIGATION IN 28 U.S.C. § 2244(b).

A. After the Conclusion of Habeas Proceedings, The Sole Interest of Capital Habeas Petitioners Is In Litigation for Litigation's Sake and the Delay That It Engenders.

When habeas corpus proceedings — the final tier of the three-tier review system available to a state prisoner to challenge the validity of his conviction or sentence — have come to a close, "the State's interests in finality are all but paramount." *Calderon v. Thompson*, 523 U.S. 538, 557 (1998). "At that point, having in all likelihood borne for years 'the significant costs of federal habeas review,' the State is entitled to the assurance of finality." *Id.*, 523 U.S. at 556 (quoting *McCleskey v. Zant*, 499 U.S. 467, 490-491 (1991)) (citation omitted). Once habeas review has been completed, therefore, a state should reasonably expect to be able to proceed to protect this interest and execute its lawful judgments. "To unsettle these expectations is to inflict a profound injury to the 'powerful and legitimate interest in punishing the guilty.'" *Id.*, 523 U.S. at 556 (quoting *Herrera v. Collins*, 506 U.S. 390, 421 (1993) (O'Connor, J., concurring)).

But, quite obviously, a capital prisoner who has exhausted the available avenues of review and who is facing imminent execution of his sentence does not share the state's interest in finality. At that point, his paramount interest is in delay; in engaging in litigation (or relitigation) for its own sake; in doing all that can be done to forestall the execution of the state court judgment. That is the reality of postjudgment capital habeas litigation. Indeed, petitioner's *amicus* openly admits that, when habeas petitioners have been cut off from one avenue of litigation, "[they] will simply style their cause of action differently." Brief of *Amicus Curiae* Abu-Ali Abdur'Rahman in Support of Petitioner (hereinafter "Abdur'Rahman Brief") at 23. And the case law bears him out. *See Burris v. Parke*, 130 F.3d 782, 783 (7th Cir. 1997) ("Instead of meeting the requirements of § 2244(b), the petitioner would restyle his request as a motion for reconsideration in the initial collateral attack and proceed as if the AEDPA did not exist."); *see also Stewart v. Martinez-Villareal*, 523 U.S. 637, 640 (1998) ("[F]earing that the newly enacted [AEDPA] might foreclose review of his . . . claim, [petitioner] moved the court to reopen his earlier petition."); *Rodwell v. Pepe*, 324 F.3d 66, 69 (1st Cir.), *cert. denied*, 540 U.S. 873 (2003). ("Attempting to find a crack in the wall that Congress had erected to guard against the profligate filing of successive applications . . . [petitioner] filed a motion to reopen his original federal habeas case."); *In re Medina*, 109 F.3d 1556, 1561 (4th Cir. 1997) (referring to petitioner's resort to postjudgment filing as his "Rule 60(b) Stratagem"). Indeed, the strategy of filing a Rule 60(b) motion as an "alternative" to filing a prohibited second or successive habeas petition has been openly advocated as a

legitimate tactic to achieve the delays that AEDPA was designed to curtail.[2]

Petitioner's *amicus* contends that the use of Rule 60(b) motions in habeas cases is limited to a narrow class of cases. Based on his own research, he asserts that such motions are "rarely filed" and even more rarely granted. Abdur'Rahman Brief at 3, 4-5. But the assertion that "district courts seldom grant relief from a final judgment under Rule 60(b)" misses the point. It is not the extent to which relief is *granted* that poses a problem; it is the successive, postjudgment litigation and the delays that necessarily ensue from the *filing* of such motions that Congress intended to eliminate through AEDPA. *See Calderon*, 523 U.S. at 553 (by filing postjudgment motion, petitioners could evade § 2244(b)(1)'s "bar against *relitigation* of claims presented in a prior application" or § 2244(b)(2)'s "bar against *litigation* of claims not presented in a prior application") (emphasis added).

"[H]abeas petitioners should not be able to make an end-run around the requirements of AEDPA by simply styling their second or successive petition a 'motion to reopen.'" *Workman v. Bell*, 227 F.3d 331, 337 n.4 (6th Cir. 2000) (en

---

[2] *See, e.g.*, Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Litigation*, 77 N.Y.U.L.Rev. 699, 792 (2002) (listing Rule 60(b) motions as an "alternative mechanism" and asserting that "Rule 60(b) offers a means for significantly reducing the systemic problems caused by AEDPA's successive petition rules"); *see also* Peter Hack, *The Roads Less Traveled: Post Conviction Relief Alternatives and the Antiterrorism and Effective Death Penalty Act of 1996*, 30 Am.J.Crim.L. 171, 221 (2003) ("In the quest for relief, prisoners have sought creative ways to avoid the strictures of the AEDPA.").

banc) (Opinion of Merritt, J.). But capital habeas petitioners have sought to do just that.[3] And although petitioner's *amicus* argues that the availability of Rule 60(b) to habeas petitioners is "critical" in order to provide relief in the truly meritorious case and to rectify an "unjust" result, Abdur'Rahman Brief at 6, 12, the argument fails to recognize that nearly *every* capital habeas petitioner believes that *his* motion is meritorious and that the result in *his* case was unjust.

Recent experience in one state starkly illustrates the "profound injury" to the State's interest in finality that can be caused by the availability of Rule 60(b) to capital habeas petitioners. That experience shows how Rule 60(b) motions can be, and are being, used by capital petitioners not only to thwart Congress' express restrictions on successive habeas litigation in AEDPA, but also effectively to derail a state's

---

[3] *See, e.g., Smith v. Anderson*, __ F.3d __, 2005 WL 517525 (6th Cir. Mar. 6, 2005), *cert. denied*, __ S.Ct. __, 2005 WL 520024 (Mar. 7, 2005); *Alley v. Bell*, 392 F.3d 822 (6th Cir. 2004); *In re Abdur'Rahman*, 392 F.3d 174 (6th Cir. 2004), *petition for cert. filed* (No. 04-1247) (Mar. 11, 2005); *Brown v. Head*, 349 F.3d 1291, 1293 (11th Cir. 2003); *Jones v. Roper*, 311 F.3d 923 (8th Cir. 2002); *Mobley v. Head*, 306 F.3d 1096 (11th Cir. 2002); *Evans v. Smith*, 220 F.3d 306, 311 (4th Cir. 2000); *In re Medina*, 109 F.3d 1556, 1561 (11th Cir. 1997); *Baze v. Haeberlin*, No. 01-cv-31 (E.D. Ky.) (motion filed Feb. 23, 2005); *Bowling v. Haeberlin*, No. 99-cv-236 (E.D.Ky.) (motion filed Nov. 12, 2004); *Johnson v. Bell*, No. 2:97-cv-3052 (W.D.Tenn.) (motion filed Oct. 13, 2004); *Workman v. Bell*, No. 2:94-cv-2577 (W.D.Tenn.) (motion filed Aug. 27, 2004); *Zuern v. Tate*, No. 1:92-cv-771 (S.D.Ohio) (motion filed March 5, 2004); *Hutchison v. Bell*, No. 3:98-cv-664 (E.D.Tenn.) (motion filed Aug. 19, 2003); *Corey v. Bradshaw*, No. 5:96-cv-797 (N.D.Ohio) (motion filed July 22, 2003); *Clayton v. Ward*, No. 4:96-cv-173 (N.D.Okla.) (motion filed Dec. 18, 2000).

efforts to protect its interest in finality and execute its lawful judgments.

B. Recent Experience In Tennessee Shows How Capital Habeas Petitioners Can Use Rule 60(b) to Thwart AEDPA's Restrictions on Successive Habeas Litigation and Debase the State's Interest in Finality.

Between April 2002 and November 2004 in the State of Tennessee, five capital prisoners were scheduled for execution after the conclusion of their federal habeas corpus proceedings: Abu-Ali Abdur'Rahman, Philip Workman, Olen Eddie Hutchison, Sedley Alley, and Donnie Johnson. In all, seven execution dates were set in their cases during this period.[4] None of these executions was carried out, and each and every one of these five prisoners, before each and every one of the seven execution dates, filed a motion for relief from judgment under Rule 60(b).[5]

---

[4] Two of these five prisoners — Abdur'Rahman and Workman — had their initial dates reset. Only one other capital prisoner was scheduled for execution during this period: Gregory Thompson. Thompson's August 19, 2004, execution was stayed by the Sixth Circuit on June 23, 2004, upon that court's *sua sponte* reconsideration of its decision affirming the denial of habeas relief and its subsequent reversal and remand of the district court judgment. That decision is now on review before this Court. *Bell v. Thompson, cert. granted* (No. 04-514) (Jan. 7, 2005).

[5] Eight 60(b) motions were filed in all: Abdur'Rahman filed two, Workman filed two, Alley filed two, and Johnson and Hutchison each filed one.

All of these motions were filed either after the Sixth Circuit's mandate had issued from the judgment denying habeas relief or after this Court had denied certiorari review of that judgment,[6] and all were filed either in anticipation of the Tennessee Supreme Court's setting an execution date, or in the wake thereof.[7] And all but one of these seven execution dates was nullified by a federal court's stay of execution issued as a direct result of the prisoner's filing of a Rule 60(b) motion.

Every one of these motions sought to revisit the merits of the district court's judgment, alleging variously that the district court's denial of relief had been "erroneous," "improper," "incorrect," or "questionable." And every motion alleged that the prisoner had been subjected to some manner of "injustice." In addition, two of the five motions insisted that the prisoner had been wrongly convicted. Finally, though such instances are supposed to be "rare," *Hanover Ins. Co. v. United States*, 880 F.2d 1503, 1506 n.3 (1st Cir. 1989), four of the five motions alleged that the prisoner had been the victim of a fraud upon the court.[8]

---

[6] *See* Fed.R.App.P. 41(d)(2)(D) (appellate mandate must issue immediately upon filing of a copy of the order denying certiorari).

[7] No 60(b) motion was filed any more than eight months prior to the scheduled execution date, and four were filed within 34 days of the execution date.

[8] *See United States v. Beggerly*, 524 U.S. 38, 46 (1998) (citing *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944)) (only a "grave miscarriage of justice" will amount to fraud on the court). The Sixth Circuit had recognized "fraud on the court" as an exception to the rule against successive petitions. *See Workman v. Bell*, 245 F.3d 849, 852 (6th Cir. 2001). Its

1. *Abu-Ali Abdur'Rahman:* Petitioner's *amicus* Abu-Ali Abdur'Rahman kicked off the Rule 60(b) parade on November 2, 2001 — twenty-four days after this Court denied certiorari review of the Sixth Circuit's denial of habeas relief, *Abdur'Rahman v. Bell,* 534 U.S. 970 (2001) — by filing the first of two Rule 60(b) motions.[9] His motion sought to reopen fourteen claims, ten of which had been denied by the district court in 1998 as procedurally defaulted, and was predicated on an intervening state court rule.[10] It alleged that the district court had erred when it ruled that these claims were procedurally defaulted and that "it would be a profound and irreparable miscarriage of justice" to deny him relief. *Abdur'Rahman v. Bell*, No. 96-cv-380 (M.D.Tenn.) (Abdur'Rahman's Nov. 2, 2001, motion for relief from judgment, pp. 8, 11)[11] After the district court transferred the 60(b) motion to the Sixth Circuit as a successive habeas petition, the Tennessee Supreme Court set an execution date of April 10, 2002. But after the Sixth Circuit approved the transfer and rejected the successive petition, this Court granted a stay of execution on April 8, 2002, *Abdur'Rahman v. Bell*, 535 U.S. 981 (2002), and granted certiorari on April

---

invocation in nearly every one of these Tennessee cases demonstrates yet another reality — when capital habeas petitioners are given an inch, they inevitably seek to take a yard.

[9] The Sixth Circuit's mandate issued on February 11, 2002.

[10] Tenn.Sup.Ct.R. 39.

[11] In subsequent proceedings before the en banc court of appeals, Abdur'Rahman asserted that his case "presents the rare Rule 60(b) motion that is not the practical equivalent of a successive application." *In re Abdur'Rahman*, Nos. 02-6547/6548 (6th Cir.) (Pet.Supp.Brf., p. 19).

22, 2002. *Abdur'Rahman v. Bell*, 535 U.S. 1016 (2002). The writ was dismissed, however, on December 10, 2002, as improvidently granted. *Abdur'Rahman v. Bell*, 537 U.S. 88 (2002).

While the State responded to this dismissal by seeking a new execution date, Abdur'Rahman responded to it by filing a second, identical Rule 60(b) motion on December 12, 2002, two days after this Court's dismissal of the writ. After the district court again transferred the motion to the court of appeals as a successive petition, the Tennessee Supreme Court, on March 6, 2003, reset the execution date for June 18, 2003. A panel of the Sixth Circuit again approved the transfer, but the en banc court granted rehearing and stayed the execution on June 6, 2003. *Abdur'Rahman v. Bell*, 332 F.3d 960 (6th Cir. 2003).[12]

2. *Philip Workman:* Meanwhile, on June 2, 2003, the Tennessee Supreme Court had reset a date of September 24, 2003, for execution of the sentence of Philip Workman, whose federal habeas proceedings had long since concluded.[13]

---

[12] The Sixth Circuit decided the case on December 13, 2004, holding that Abdur'Rahman's 60(b) motion was not a successive petition, and the stay remains in place. *In re Abdur'Rahman*, 392 F.3d 174 (6th Cir. 2004), *petition for cert. filed* (No. 04-1247) (March 11, 2005).

[13] *See Workman v. Bell*, 178 F.3d 759 (6th Cir. 1998). The Sixth Circuit's mandate issued in Workman's habeas case on October 12, 1999. An execution date had been scheduled and stayed in 2000, when Workman moved to reopen his appeal in the Sixth Circuit. *See Workman v. Bell*, 209 F.3d 940 (6th Cir. 2000). An execution date was also scheduled and stayed in 2001, when Workman petitioned in state court for a writ of error coram nobis.

Twenty-one days before the execution, on September 3, 2003, Workman filed a motion for relief from judgment under Rule 60(b). This motion sought to reopen several claims that the district court had denied in 1996 on their substantive merits and was predicated on allegations of "fraud and misconduct,"[14] as well as intervening appellate decisions of this Court and the Sixth Circuit.[15] It alleged that the district court had erred when it denied relief on these claims, that Workman had been "unjustly convicted," that the court needed to "prevent a miscarriage of justice," and that, because Workman's life was at stake, the court should "remedy the inequity that has occurred." *Workman v. Bell*, No. 94-2577 (W.D.Tenn.) (Workman's Sept. 3, 2003, motion for relief from judgment, pp. 4, 14, 18). Workman also moved for a stay of execution, but on September 15, 2003, the Governor of Tennessee issued a temporary reprieve for reasons unrelated to the 60(b) motion.

The reprieve was lifted seven months later, however, and on May 4, 2004, the Tennessee Supreme Court reset the date of execution to September 22, 2004. Twenty-six days before the execution, on August 27, 2004, Workman filed a second, nearly identical 60(b) motion, which he styled as a "First

---

See Workman v. State, 41 S.W.3d 100 (Tenn. 2001).

[14] The fraud allegations were based largely on evidence Workman presented at his state coram nobis hearing — evidence that the state courts concluded would have made no difference had it been presented at his trial. *See State v. Workman*, 111 S.W.3d 10 (Tenn.Crim.App. 2002).

[15] *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Davis v. Mitchell*, 318 F.3d 682 (6th Cir. 2003), *cert. denied*, 124 S.Ct. 2902 (2004).

Amended" motion. This motion sought to reopen all the claims presented in the first motion, as well as an additional claim that had been denied by the district court in 1996 as procedurally defaulted.[16] *Workman v. Bell*, No. 94-2577 (W.D.Tenn.) (Workman's August 27, 2004, "First Amended" motion for relief from judgment). On September 1, 2004, the district court stayed the execution on the basis of the 60(b) motion, pointing to the pendency of Abdur'Rahman's case in the Sixth Circuit.[17]

3. *Olen Eddie Hutchison*: At about the same time that Workman's 2003 execution date was being reset, the habeas proceedings of Olen Eddie Hutchison were coming to a close. On August 19, 2003, less than two months after this Court denied certiorari review of the Sixth Circuit's denial of habeas relief, *Hutchison v. Bell*, 539 U.S. 944 (2003), Hutchison filed a motion for relief from judgment under Rule 60(b).[18] This motion sought to reopen three claims — two that the district court had denied in 2000 as procedurally defaulted, and one that it had denied on its substantive merits. The motion was predicated on allegations of "fraud upon the

[16] This additional ground was predicated on another intervening decision of the Sixth Circuit, *Cone v. Bell*, 359 F.3d 785 (6th Cir. 2004), *rev'd, Bell v. Cone*, 125 S.Ct. 847 (2005).

[17] The State moved to vacate in the Sixth Circuit, but a panel of that court denied the motion without prejudice to its renewal. After Abdur'Rahman's case was decided, the State renewed its motion to vacate, and it remains pending. *See Workman v. Bell*, Nos. 04-6037/6038 (6th Cir.).

[18] The Sixth Circuit's mandate issued on September 12, 2003.

court,"[19] an intervening state court rule,[20] and intervening appellate decisions of the Sixth Circuit.[21] It alleged that the district court had "improperly imposed a procedural bar," that Hutchison had not received "equal justice," and that "[p]rinciples of justice and fairness require that this [c]ourt take another look at the case . . . ." *Hutchison v. Bell*, No. 3:98-664 (E.D.Tenn.) (Hutchison's August 19, 2003, motion for relief from judgment, pp. 2, 7, 18)

On September 30, 2003, the Tennessee Supreme Court set a date of March 11, 2004, for execution of Hutchison's sentence. On January 22, 2004, the district court stayed Hutchison's execution on the basis of his 60(b) motion. Although the court had construed the motion as a successive habeas petition, the court pointed to the pendency of Abdur'Rahman's case in the Sixth Circuit as grounds for the stay.[22]

4. *Sedley Alley*: Shortly after habeas proceedings concluded in Hutchison's case, they also concluded in Sedley Alley's case. On October 6, 2003, this Court denied

[19] The fraud allegations were based on a legal argument made by the State in its brief in opposition to the petition for writ of certiorari Hutchison filed in 2002.

[20] Tenn.Sup.Ct.R. 39.

[21] *Adams v. Holland*, 330 F.3d 398 (6th Cir. 2003), *cert. denied*, 541 U.S. 956 (2004), and *Davis*, 318 F.3d 682.

[22] The State moved to vacate the stay in the Sixth Circuit on February 17, 2004, but the execution date passed without a decision on the motion. The motion was subsequently denied on May 24, 2004.

certiorari review of the Sixth Circuit decision affirming the denial of habeas relief, *Alley v. Bell*, 540 U.S. 839 (2003), and Alley filed a motion for relief from judgment under Rule 60(b) four days later, on October 10, 2003.[23] The motion sought to reopen two claims, both of which had been denied by the district court in 1999 on their substantive merits. *Alley v. Bell*, No. 97-3159 (W.D.Tenn.) (Alley's October 10, 2003, motion for relief from judgment).

On January 16, 2004, the Tennessee Supreme Court set a date of June 3, 2004, for execution of Alley's sentence. Twenty-seven days before the execution, on May 12, 2004, Alley filed a second 60(b) motion, which he styled a "First Amended" motion.[24] This motion sought to reopen the two claims addressed by the first motion, as well as a third claim that had also been denied by the district court in 1999 on its substantive merits. The motion was predicated on allegations of "fraud upon the court"[25] and intervening appellate decisions of the Sixth Circuit and the Tennessee Supreme Court.[26] It alleged that the denial of relief was "clearly

---

[23] The Sixth Circuit's mandate issued on October 27, 2003.

[24] The district court entered an order on April 19, 2004, striking Alley's initial motion, without prejudice, and instructing him that he could refile after Abdur'Rahman's case was decided.

[25] The fraud allegations were based on supposedly "new" and allegedly withheld evidence. But the Sixth Circuit subsequently determined that Alley's "fraud on the court" claim "was essentially indistinguishable from a standard *Brady* constitutional claim." *Alley v. Bell*, 392 F.3d 822, 831 (6th Cir. 2004).

[26] *Cone*, 359 F.3d 785, and *State v. Carter*, 114 S.W.3d 895 (Tenn. 2003), *cert. denied*, 540 U.S. 1221 (2004).

erroneous," that Alley "did not commit the offense for which he was convicted," and that his was "one of the rare cases which 'cries out for the exercise of that equitable power to do justice.'" *Alley v. Bell*, No. 97-3159 (W.D.Tenn.) (Alley's May 12, 2004, "First Amended" motion for relief from judgment, pp. 1, 4, 9). On May 19, 2004, the district court stayed Alley's execution on the basis of his 60(b) motion, pointing to the pendency of Abdur'Rahman's case in the Sixth Circuit.

The State moved to vacate the stay in the Sixth Circuit, but a panel of that court declined to grant the motion and set the matter for expedited briefing and argument. The case was not decided, however, until the day after Abdur'Rahman's case was decided. The court then vacated the stay, holding that Alley's motion was a successive petition. *Alley v. Bell*, 392 F.3d 822, 829 (6th Cir. 2004).[27] Although the State promptly moved to set a new date for execution of Alley's sentence, the Tennessee Supreme Court, no doubt gun-shy at this point, denied the motion, noting "the potential for further rulings by the federal courts that could render ineffectual any date set."[28]

5. *Donnie Johnson:* Approximately two months before Alley's June 2004 scheduled execution date, habeas proceedings concluded for Donnie Johnson. This Court denied certiorari review of the Sixth Circuit's denial of habeas relief on April 26, 2004, *Johnson v. Bell*, 541 U.S. 1010

---

[27] Though a petition for en banc rehearing is pending, the district court ordered Alley on March 16, 2005, to withdraw his 60(b) motion by April 20, 2005.

[28] *See State v. Alley*, No. M1991-00019-SC-DPE-DD (Tenn.) (Jan. 6, 2005, order denying motion to reset date of execution).

(2004), and the Sixth Circuit mandate issued on May 5, 2004. On August 10, 2004, the Tennessee Supreme Court set a date of November 16, 2004, for execution of Johnson's sentence. A month before the execution, on October 13, 2004, Johnson filed a motion for relief from judgment under Rule 60(b). The motion sought to reopen three claims that had been denied by the district court in 2001 as procedurally defaulted, and it was predicated on allegations of "fraud, misconduct, or misrepresentation"[29] and intervening appellate decisions of this Court and the Sixth Circuit.[30] It alleged that the district court had issued an "unjust judgment," that the denial of relief was "clearly erroneous," that "there could be no greater injustice," and that, because Johnson's life was at stake, the court should "remedy the inequity that has occurred . . . ." *Johnson v. Bell*, No. 2:97-3052 (W.D.Tenn.) (Johnson's October 13, 2004, motion for relief from judgment, pp. 4, 7, 12, 18). The district court stayed Johnson's execution on the basis of his 60(b) motion, again pointing to the pendency in the Sixth Circuit of Abdur'Rahman's case.[31]

---

[29] The fraud allegations were based on an affidavit Johnson presented that allegedly rebutted an affidavit presented to the district court in the course of the habeas proceedings.

[30] *Banks v. Dretke*, 540 U.S. 668 (2004); *Cone*, 359 F.3d 785; and *Davis*, 318 F.3d 682.

[31] The State moved to vacate in the Sixth Circuit, but that motion was denied without prejudice on November 15, 2004. *See Johnson v. Bell*, No. 04-6361 (6th Cir.). The State has since moved in the district court to vacate the stay, and that motion remains pending.

II. MOTIONS FILED UNDER RULE 60(B) THAT SEEK TO REVISIT THE MERITS OF THE UNDERLYING FEDERAL HABEAS JUDGMENT SHOULD BE REGARDED AS SECOND OR SUCCESSIVE PETITIONS.

A. This Court Endorsed the Proper Rule In *Calderon v. Thompson*.

In *Calderon v. Thompson*, 523 U.S. 538 (1998), this Court endorsed the proposition that a habeas petitioner's postjudgment motion that the court revisit the merits of its earlier decision denying habeas relief can be regarded as a second or successive application for purposes of 28 U.S.C. § 2244(b). 523 U.S. at 553, 557. Indeed, this proposition appears to have enjoyed the Court's unanimous support. *See id.*, 523 U.S. at 569 & n.1 (Souter, J., dissenting). "Otherwise, petitioners could evade the bar against relitigation of claims presented in a prior application, § 2244(b)(1), or the bar against litigation of claims not presented in a prior application, § 2244(b)(2)." *Id.*, 523 U.S. at 553. The Court observed, however, that such a rule prohibiting relitigation of the merits of the underlying habeas judgment would not extend to postjudgment motions alerting the court to clerical errors, like those described in Fed.R.Civ.P. 60(a); nor would it extend to postjudgment motions alleging a fraud upon the court and thus "calling into question the very legitimacy of the judgment." *Id.*, 523 U.S. at 557 (citing *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944)).

But as discussed above, habeas petitioners have routinely utilized Rule 60(b) to do precisely what § 2244(b) and *Calderon* say they cannot: revisit the merits of the underlying federal habeas judgment. And although *Calderon* was not a

case involving the strict application of AEDPA,[32] this Court should adhere to the rule it endorsed there and hold that 60(b) motions that seek to revisit the merits of the underlying federal habeas judgment not only can, but must, be regarded as second or successive petitions. Anything less will simply fail to effectuate AEDPA's bar against successive habeas litigation.[33]

---

[32] AEDPA did not strictly apply in *Calderon* merely because the court of appeals had not acted on the basis of any matter presented by the petitioner's second petition, *i.e.*, his motion to recall the mandate, but instead had acted *sua sponte* on the basis of the first petition. *See id,* 523 U.S. at 554.

[33] Petitioner and his *amicus* argue that *Calderon* is inapposite because it involved a postjudgment motion to recall the mandate in the court of appeals, and not a postjudgment motion for relief from judgment in the district court. Pet.Br. at 23-24; Brief of the Office of the Federal Public Defender for the Middle District of Tennessee as *Amicus Curiae* in Support of Petitioner at 10 n.6. This attempt to distinguish *Calderon* is unpersuasive. A motion to recall the mandate asks the court of appeals to exercise its inherent authority to reopen and revisit its own judgment, *see Calderon*, 523 U.S. at 550; as petitioner and his *amicus* insist, so too does a motion for relief from judgment. *See Burris*, 130 F.2d at 783 (motion to recall mandate is court of appeals' "equivalent" of motion for relief from judgment in district court). Moreover, what matters is not how a motion for relief from judgment compares to a motion to recall the mandate, but how each compares to a second or successive petition. Viewed in this light, if *a motion to reopen and revisit the merits of a habeas judgment* in the court of appeals can be regarded as a second habeas petition, how can *a motion to reopen and revisit the merits of a habeas judgment* in the district court not be?

B. The "Functional Approach" Touted By Petitioner and His *Amici* Is Fundamentally Flawed.

Notwithstanding this Court's decision in *Calderon*, some courts of appeals have adopted, and petitioner and his *amici* highly tout, a "functional approach" to determining whether a motion ostensibly filed under Rule 60(b) should be treated as a second or successive petition under § 2244(b). But this approach is fundamentally flawed — it fails to account for an entire category of Rule 60(b) motions. And the flaw in this approach leads to its treating 60(b) motions differently depending upon whether the underlying judgment was based on substantive or procedural grounds. Drawing a distinction on this basis is legally unsupportable and has significant ramifications inconsistent with the intent of AEDPA.

1. Unlike the rule endorsed in *Calderon*, which asks whether the postjudgment motion seeks to reopen on the basis of the merits of the underlying federal court judgment, this so-called "functional approach" asks a different question: whether the postjudgment motion directly challenges the constitutionality of the underlying state court conviction or sentence. *See In re Abdur'Rahman*, 392 F.3d 74, 181 (6th Cir. 2004), *petition for cert. filed* (No. 04-1247) (March 11, 2005) (citing *Rodwell v. Pepe*, 324 F.3d 66, 70 (1st Cir.), *cert. denied*, 540 U.S. 873 (2003)); *United States v. Winestock*, 340 F.3d 200, 207 (4th Cir.), *cert. denied*, 540 U.S. 995 (2003). "[I]f — and only if —" it does, then the motion can be treated as a successive petition. *Rodwell*, 324 F.3d at 67. This part of the test embraces motions seeking to revisit the merits of a habeas judgment denying relief on substantive grounds. *See, e.g., Smith v. Anderson*, __ F.3d __, 2005 WL 517525, *2, 5 (6th Cir. Mar. 6, 2005), *cert. denied*, __ S.Ct. __, 2005 WL 520024 (Mar. 7, 2005); *Alley*

v. Bell, 392 F.3d 822, 826, 829 (6th Cir. 2004), *Winestock*, 340 F.3d at 202, 208.

Conversely, according to the functional approach, if the factual predicate for a 60(b) motion alleges a defect or procedural irregularity in the habeas process, and thus challenges the "integrity" of the habeas judgment, then it should be treated as a legitimate 60(b) motion. *Abdur'Rahman*, 392 F.3d at 181; *Rodwell*, 324 F.3d at 70; *see Winestock*, 340 F.3d at 207. This second part of the test embraces motions that do not seek to revisit the merits of the judgment denying a habeas claim, but instead challenge the *process* that led to that judgment. *See Rodwell*, 324 F.3d at 70 (citing "[m]istake and fraud" as examples); *Winestock*, 340 F.3d at 207 (citing "fraud on the court" as an example); *see also Dunlap v. Litscher*, 301 F.3d 873, 876 (7th Cir. 2002) (suggesting that motion alleging that dismissal had been procured by state's "making fraudulent representations" would not be successive petition); *Thompson v. Calderon*, 151 F.3d 918, 921 n.3 (9th Cir. 1998) (en banc) (stating that state's misconduct in preventing a petitioner from testing potentially exculpatory evidence "might" make a 60(b) motion appropriate).[34]

The logical flaw in this approach lies in the fact that its second part is not a true converse of the first; it fails to account for a third category of 60(b) motions — those motions whose factual predicates neither directly challenge the

[34] It is this category of postjudgment motions that this Court seemed to have in mind when in *Calderon* it identified, in passing, examples of exceptions to the rule that it endorsed there, *i.e.*, instances of clerical error and fraud upon the court. 523 U.S. at 557.

underlying state court judgment nor allege a defect or irregularity in the habeas process. An obvious example of such a motion is one seeking to revisit the merits of a habeas judgment denying relief on *procedural* grounds, *i.e.*, one, like petitioner's, seeking to revisit the merits of a dismissal on statute of limitations grounds;[35] or one, like that of petitioner's *amicus*, seeking to revisit the merits of a denial of relief on procedural default grounds. *See Abdur'Rahman*, 392 F.3d at 182. 60(b) motions like these do the work of successive petitions; in both instances, the habeas petitioner is "continuing his collateral attack on his conviction or sentence." *Winestock*, 340 F.3d at 207. But the functional approach would not treat these motions as successive petitions, simply because it fails to address them at all. *See Abdur'Rahman*, 392 F.3d at 182 (motion seeking to revisit merits of habeas judgment, "specifically, the basis for the district judge's procedural default ruling," did not present a direct challenge to underlying state court conviction and, thus, should not be treated as a successive petition); *see also Harper v. Vaughn*, 272 F.Supp.2d 527, 532 (E.D.Pa. 2003) (motion alleging error in procedural default judgment did not

[35] Petitioner's motion solely contended "that the judgment was wrong," based on intervening appellate decisions. J.A. 69 It cannot be said that his motion directly challenges the underlying state court conviction or sentence. But neither can it be said that it attacks the *integrity* of the judgment, or the process that led to it. It attacks the *correctness* of that judgment, *see* J.A. 69, in the very same way that a motion contending that a substantive merits judgment was wrong attacks the correctness and not the integrity of that judgment. But the functional approach would treat these two motions differently.

raise arguments concerning constitutionality of state court conviction and, thus, was not successive petition).[36]

2. The functional approach thus operates so as to treat 60(b) motions differently depending upon whether the prior judgment denied claims on substantive grounds or on procedural grounds. *See Abdur'Rahman*, 392 F.3d at 181 (inviting comparison of *Hamilton v. Newland*, 374 F.3d 822 (9th Cir. 2004), *cert. denied*, __ S.Ct. __, 2005 WL 517049 (Mar. 7, 2005), in which 60(b) motion was not treated as successive petition where it sought reconsideration of prior dismissal under statute of limitations, *id.*, 374 F.3d at 824, with *Rodwell*, 324 F.3d 66, in which 60(b) motion was regarded as successive petition where it asserted, at most, that district court "would have ruled differently" on Sixth Amendment claim, *id.*, 324 F.3d at 72). But there is no support in § 2244(b), or in this Court's prior decisions, for distinguishing postjudgment habeas motions on this basis.

28 U.S.C. § 2244(b)(1) provides that "[a] claim presented in a second or successive habeas corpus application under

---

[36] It is no answer to say that a motion seeking to revisit the merits of a prior procedural judgment is fairly characterized as a 60(b) motion, and not a successive petition, because the challenge it presents to the underlying state court conviction is indirect. *See Abdur'Rahman*, 392 F.3d at 180-181. Even a second habeas petition presenting claims previously adjudicated on procedural grounds would present only an indirect challenge to the underlying state court conviction. Such claims would not, and could not, be considered until and unless the petitioner also presents some basis upon which to overcome the prior procedural judgment, *i.e.*, until he shows why the court was wrong to have denied them the first time — just as is the case when the claims are presented for reopening in a 60(b) motion.

section 2254 that was presented in a prior application shall be dismissed." Period. The statute includes no mention whatever of the basis upon which the claims presented in the prior application need to have been adjudicated. It certainly does not provide that the claims presented in the prior application need to have been adjudicated on their merits, much less their substantive merits. AEDPA, in fact, pointedly removed any such reference from § 2244(b),[37] evincing Congress' clear intent that no distinction be drawn based on the grounds upon which the claims were previously adjudicated.[38]

---

[37] The predecessor version of § 2244(b) provided:

> When after an evidentiary hearing *on the merits* of a material factual issue, or after a hearing *on the merits* of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

28 U.S.C. § 2244(b) (1996) (emphasis added).

[38] Drawing a distinction between claims adjudicated on substantive grounds and those adjudicated on procedural grounds is also inconsistent with another aspect of the habeas scheme

And this Court's prior decisions interpreting § 2244(b), *Slack v. McDaniel*, 529 U.S. 473 (2000), and *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), instruct that claims presented in the prior application need only have been *finally* adjudicated, not that they have been adjudicated on any particular grounds. These two cases involved claims presented in a prior application that had been dismissed as premature and dismissed for failure to exhaust, respectively. The Court held in both cases that a subsequent presentation of the claim did not violate the statute's prohibition against successive petitions because "in both situations, the habeas petitioner does not receive an adjudication of his claim." *Martinez-Villareal,* 523 U.S. at 645. But the same cannot be said of the dismissal or denial of habeas claims on procedural grounds such as the statute of limitations or procedural default, for in those instances, the habeas petitioner *does* receive an adjudication of his claim. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 228 (1995) (rules of finality treat dismissal on statute of limitations grounds as a "judgment on the merits"); *see also Murray v. Greiner,* 394 F.3d 78, 81 (2d Cir. 2005) (dismissal on basis of statute of limitations, like dismissal on basis of procedural default, was "adjudication on the merits"). The notion, then, that a habeas petitioner is entitled to one substantive merits adjudication — the stated and unstated lynchpin of the arguments advanced by and on behalf of petitioner — is simply unsustainable.

---

established under AEDPA. Under 28 U.S.C. § 2253, an appeal from the denial of habeas relief cannot proceed without a certificate of appealability. And as this Court held in *Slack v. McDaniel*, 529 U.S. 473 (2000), claims denied on procedural grounds are subjected to a very similar standard for determining whether an appeal is justified as are those denied on their substantive merits. *See id.*, 529 U.S. at 484.

3. The logical flaw in the functional approach, and its consequent, and unsupportable, substantive/procedural distinction between final habeas judgments, is no small matter. A 1995 Justice Department report found that 63% of all habeas corpus claims were dismissed and that 12% of these were procedurally defaulted. U.S. Dep't of Justice, Office of Justice Programs, *Federal Habeas Corpus Review, Challenging State Court Criminal Convictions* 17 (1995).[39] In capital cases, claims are typically denied or dismissed on procedural grounds at a far higher rate. In the five Tennessee capital cases featured above, for example, 44% of all the claims presented in the petitions, on average, were dismissed or denied on procedural grounds.[40]

A capital habeas petitioner, then, intent on engaging in successive relitigation after his habeas proceedings have concluded so as to delay execution of the state court judgment, would have a grand reservoir of claims available for resurrection by filing a 60(b) motion. And adoption of the "functional approach" would allow him to do it; indeed, the "case by case" inquiry demanded by the functional approach

---

[39] This 1995 report was issued, of course, before the creation of a federal habeas statute of limitations, which added yet another procedural ground upon which claims could be dismissed or denied. While wholesale dismissal of capital habeas petitions on timeliness grounds is admittedly rare, individual claims added after the limitations period has run nevertheless can be dismissed on such grounds. *But see Mayle v. Felix,* 125 S.Ct. 824 (2005) (granting certiorari to address question whether habeas petition may be amended by adding a new claim after limitations period has run).

[40] Abdur'Rahman: 51 of 89 claims (57%); Hutchison: 91 of 188 claims (48%); Workman: 9 of 48 claims (19%); Alley: 29 of 72 claims (40%); Johnson: 61 of 108 claims (56%).

effectively *invites* him to do it. *Rodwell*, 324 F.3d at 70. He would need only to assemble a new argument, based, for example, on intervening court decisions or newly gathered evidence, for why the district court's procedural judgment was erroneous, *i.e.*, for why the statute of limitations was improperly applied, or for why he can now show that he did exhaust his claims, or for why he can now show cause for his default, or for why he can now show a fundamental miscarriage of justice, *etc*. *See* J.A. 69 (observing how habeas petitioner could use Rule 60(b) to reopen on basis of a new decision "even if that decision came ten, twenty, or thirty years after the judgment had been rendered").

The finality of a federal court's habeas judgment is not so frail, at least not under AEDPA. Indeed, this Court has long encouraged, if not insisted, that federal habeas courts dispose of presented claims on any available procedural grounds — without reaching the substantive merits of those claims. *See Lambrix v. Singletary*, 520 U.S. 518, 524 (1997); *Smith v. Murray*, 477 U.S. 527, 533 (1986). It would be quite strange for such procedural judgments to now enjoy a lesser degree of finality than those based on the court's having reached the substantive merits of a claim.

Petitioner and his *amicus* stress the importance of the balance struck by Rule 60(b) between the value of finality and the need for justice, Pet.Br. at 40; Abdur'Rahman Brief at 4, 20, but in the habeas context, particularly the capital habeas context, Congress has found it necessary to strike a different balance between these interests — one that places greater emphasis on the finality of federal habeas judgments and, at the same time, gives regard to the "paramounce" of the states' interest in finality. While petitioner and his *amici* may perceive unfairness in Congress' determination, the debate has

nonetheless been closed. And it is wrong for them to ask this Court to reopen it.

CONCLUSION

For the reasons advanced herein and in respondent's brief, the judgment of the Eleventh Circuit Court of Appeals should be affirmed.

Respectfully submitted,

PAUL G. SUMMERS
Attorney General and Reporter
State of Tennessee
MICHAEL E. MOORE
Solicitor General
JOSEPH F. WHALEN*
Associate Solicitor General
425 Fifth Avenue North
Nashville, Tennessee 37243
(615) 741-3499

TROY KING
Attorney General
State of Alabama
State House
11 S. Union Street
Montgomery, Alabama 36130
(334) 242-7300

TERRY GODDARD
Attorney General
State of Arizona
1275 West Washington
Phoenix, Arizona 85007
(602) 542-4266

MIKE BEEBE
Attorney General
State of Arkansas
200 Tower Building
323 Center Street
Little Rock, Arkansas 72201
(501) 682-2007

JOHN W. SUTHERS
Attorney General
State of Colorado
1525 Sherman Street
7th Floor
Denver, Colorado 80203
(303) 866-3557

CHRISTOPHER L. MORANO
Chief State's Attorney
State of Connecticut
300 Corporate Place
Rocky Hill, Connecticut 06067
(860) 258-5800

M. JANE BRADY
Attorney General
State of Delaware
Delaware Dep't of Justice
820 N. French Street
Wilmington, DE 19801
(302) 577-8338

THURBERT E. BAKER
Attorney General
State of Georgia
State Law Department
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3300

MARK J. BENNETT
Attorney General
State of Hawaii
425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1500

LAWRENCE G. WASDEN
Attorney General
State of Idaho
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-2400

LISA MADIGAN
Attorney General
State of Illinois
James R. Thompson Center
100 W. Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-3698

STEVE CARTER
Attorney General
State of Indiana
302 W. Washington Street,
Govt. Center South - 5th Floor
Indianapolis, Indiana 46204
(317) 232-6201

GREGORY D. STUMBO
Attorney General
Commw. of Kentucky
Suite 118, State Capitol
Frankfort, KY 40601
(502) 696-5300

JIM HOOD
Attorney General
State of Mississippi
P.O. Box 220
Jackson, Mississippi 39205
(601) 359-3680

JEREMIAH W. (JAY) NIXON
Attorney General
State of Missouri
Supreme Court Building
207 West High Street
Jefferson City, MO 65101
(573) 751-3321

MIKE MCGRATH
Attorney General
State of Montana
215 North Sanders
P.O. Box 201401
Helena, Montana 59620
(406) 444-2026

JON BRUNING
Attorney General
State of Nebraska
Nebraska Dep't of Justice
P.O. Box 98920
Lincoln, Nebraska 68509
(402) 471-2644

BRIAN SANDOVAL
Attorney General
State of Nevada
Nevada Department of Justice
100 North Carson Street
Carson City, Nevada 89701
(775) 684-1112

JIM PETRO
Attorney General
State of Ohio
30 E. Broad Street
17th Floor
Columbus, Ohio 43215
(614) 466-8980

W. A. DREW EDMONDSON
Attorney General
State of Oklahoma
2300 N. Lincoln Boulevard
Suite 112
Oklahoma City, OK 73105
(405) 521-3921

THOMAS W. CORBETT, JR.
Attorney General
Commw. of Pennsylvania
16th Floor
Strawberry Square
Harrisburg, PA 17120
(717) 787-3391

LAWRENCE E. LONG
Attorney General
State of South Dakota
500 East Capitol Avenue
Pierre, South Dakota 57501
(605) 773-3215

GREG ABBOTT
Attorney General
State of Texas
Capitol Station
P.O. Box 12548
Austin, Texas 78711-2548
(512) 463-2100

MARK L. SHURTLEFF
Attorney General
State of Utah
Utah State Capitol Complex
East Office Building
Suite 320
Salt Lake City, Utah 84114
(801) 538-9600

JUDITH WILLIAMS JAGDMANN
Attorney General
Commonwealth of Virginia
900 East Main Street
Richmond, Virginia 23219
(804) 786-2436

PATRICK J. CRANK
Attorney General
State of Wyoming
123 State Capitol
Cheyenne, Wyoming 82002
(307) 777-7841

Counsel for Amici Curiae

**Counsel of Record*